No. SC85329

IN THE SUPREME COURT OF MISSOURI

MARK A. CHRISTESON

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Vernon County, Missouri
Twenty-eighth Judicial Circuit
The Honorable C. David Darnold, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion for postconviction relief pursuant to Supreme Court Rule 29.15. Appellant had sought to vacate his three sentences of death obtained in the Circuit Court of Vernon County. This Court has jurisdiction over this appeal because of its order effective July 1, 1988, that all death penalty post-conviction appeals be heard here, pursuant to this Court's power under Supreme Court Rule 83.01.

STATEMENT OF FACTS

Appellant, Mark A. Christeson, was charged by information with three counts of murder in the first degree, § 565.020[1] (L.F. 44-48).[2] On August 26-September 2, 1999, the cause went to trial before a jury in the Circuit Court of Vernon County, the Honorable C. David Darnold presiding (Tr1, 1519).

Trial Evidence: Guilt Phase

Appellant and his cousin, Jesse Carter, lived in the home of their relative, David Bolin, in a rural area near Vichy, Missouri (Tr845-47, 963-64). Appellant and Carter were unhappy there because Mr. Bolin monitored their phone calls and made them work on the property (Tr1033, 1403).

Susan Brouk, the thirty-four year-old mother of Adrian Brouk, age twelve, and Kyle Brouk, age nine, lived in a home about a half-mile away from Mr. Bolin's home (Tr794-95, 841). Appellant thought Ms. Brouk was a "bitch" because she had made him get off her property a couple of times (Tr965-66).

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[1] All statutory citations are to RSMo 2000, unless otherwise noted.

[2] Respondent cites to the record as follows: trial transcript (Tr), trial legal file (L.F.), postconviction relief transcript (PCRTr), postconviction relief legal file (PCRL.F.), disqualification of motion court hearing (DQTr).

On Saturday, January 31, 1998, appellant and Carter talked about running away (Tr965). Appellant said he would rape Ms. Brouk and steal her Bronco, and then he and Carter would drive to Blythe, California, a small town in the desert (Tr965-66, 1238).

The next morning, Sunday, February 1, 1998, after Mr. Bolin left for work at 10:45 a.m., appellant and Carter each took a shotgun and went to Ms. Brouk's house (Tr847, 966-67). Appellant and Carter entered Ms. Brouk's living room, and Carter tied up the children's hands with shoelaces (Tr970-72). At some point during the confrontation, they hit Kyle and Ms. Brouk over the head with an object, causing bleeding (Tr918, 924, State's Exhibit 36). While Carter watched Adrian and Kyle, appellant forced Ms. Brouk into Adrian's bedroom at gunpoint (Tr970-71, 974-76). Appellant raped Ms. Brouk on her daughter's bed (Tr975-76, 1070, 1116-17, 1148, 1420). After about thirty minutes, he brought her back out, and Carter tied her hands behind her back with a yellow rope (Tr910, 975-76, 980, State's Exhibit 22). Ms. Brouk told appellant, "You had your fun, now get out." (Tr979). Adrian recognized Jesse Carter and said his name, so appellant decided to kill all of them (Tr979-81). Appellant and Carter put Ms. Brouk and her children into the Bronco, and Carter watched them while appellant took the television, VCR, Nintendo, car stereo, music CDs, Ms. Brouk's checkbook, and Adrian's fishing pole, and loaded them into Ms. Brouk's Bronco (Tr982, 1002-1003).

Appellant drove the Bronco down the highway, down a gravel road, and drove slowly across a neighbor's field to a pond at the edge of some woods (Tr984-85, 1180-81, 1194, 1200-1205, State's Exhibit 1). Appellant and Carter forced Ms. Brouk, Adrian, and Kyle to the bank of the pond, and appellant kicked Ms. Brouk so she fell to the ground (Tr986-87). Appellant took a knife and cut her throat (Tr987, State's Exhibit 35). He did not cut her deeply enough to sever her major blood vessels, so she did not immediately die, but lay bleeding heavily on the bank of the pond (Tr913-15, 987-88). Ms. Brouk told Adrian and Kyle that she loved them (Tr988). Then appellant cut Kyle's throat twice, and held him under the murky pond water until he drowned (Tr916-17, 919, 990-91, State's Exhibit 39). Carter pushed Kyle's body into the pond (Tr991). While Carter was getting a cinderblock from a nearby barn, appellant fired a shot at Adrian, but only one pellet struck her arm (Tr921, 927, 989-92). Carter held Adrian's feet while appellant pressed down on her throat until she suffocated (Tr922, 992-93). Carter pushed Adrian's body into the pond (Tr993). Appellant and Carter threw Ms. Brouk, who was still alive but barely breathing, into the pond on top of her children's bodies, where she drowned (Tr915, 993-94, State's Exhibits 15-16). Then Carter got a large stick and pushed their bodies out further into the pond (Tr994).

Appellant and Carter returned to Mr. Bolin's house, parked the Bronco by a garbage pile, loaded their personal belongings into an Oldsmobile, drove the Oldsmobile to the Bronco, and loaded their belonging into the Bronco (Tr851, 995, 1173-74, 1405-

1407). A relative saw them and ran after them, but appellant and Carter drove away (Tr999-1000).

When Ms. Brouk and her children did not come to Sunday dinner on the afternoon of February 1, 1998, Ms. Brouk's sister, Kay Hayes, thought it was unusual, but did not begin to worry until Tuesday evening, February 3, 1998, when she called Ms. Brouk's home and there was no answer (Tr796-97). That evening Ms. Hayes called another sister, Joy Lemoine, to see if she had heard from Ms. Brouk, and Ms. Lemoine had not (Tr806-807). On Wednesday evening, February 4, 1998, several family members and a friend went to Ms. Brouk's house (Tr807-808). Inside they found that all three pairs of Ms. Brouk's prescription glasses and the children's and Ms. Brouk's coats were still in the house, and that her television, VCR, and Bronco were gone (Tr808-809, 811-12). They called the police, and that night officers secured the home and conducted a limited search around the property (Tr839, 897). Officers talked to Mr. Bolin, and found out that appellant and Carter were also gone (Tr842-43, 850).

The next morning, officers flew a helicopter over the area, and saw Ms. Brouk's body in the pond (Tr864-65, 869). They also found the bodies of Adrian and Kyle in the pond (Tr869-70). They investigated the area around the pond and found a shotgun shell, bloody leaves and mud, shoe prints, and two cinder blocks on the bank of the pond, and found tire tracks going from the pond to the garbage pile at the Bolin's (Tr872-73, 885).

After the rape and murders, appellant and Carter fled to California (Tr999-1013, 1407-11). On the way, they sold and pawned Ms. Brouk's property and one of their shotguns to pay for gas and food (Tr1001-1013, 1211-20, 1228-32, 1316-17). They were stopped twice by police, but the Bronco had not yet been reported stolen, so they were not arrested (Tr1222, 1233-34, 1272-73). On February 9, 1998, appellant and Carter were arrested in Blythe, California (Tr1238-41). Carter confessed to the murders (Tr1289-97). Officers searched the Bronco and found Adrian's fishing pole in the back (Tr1278-79, State's Exhibits 68-69).

Autopsies showed that Ms. Brouk could have survived about one hour after appellant cut her neck before bleeding to death, but that the actual cause of death was drowning (Tr914-15). She and Kyle had both sustained blunt force trauma to the head (Tr911, 924, State's Exhibit 36). There were two cuts across Kyle's neck, a 2 ½ inch cut and a 3 ½ inch cut. (Tr916-17, State's Exhibit 39). Kyle did not die from the cuts, but died from being drowned (Tr917-19). There was a puncture wound in Adrian's left arm, consistent with being hit by a pellet from a shotgun shell (Tr921, 926-27, State's Exhibit 44). Adrian died from being suffocated (Tr922).

DNA testing established the semen found in Ms. Brouk's vagina and on Adrian's sheets was from appellant (Tr1144-48). The odds of the match happening by chance were one in 1,320,000,000 (Tr1148). Firearm testing established that the gun appellant

had pawned was the gun that fired the shotgun shell found on the banks of the pond (Tr1093, 1311-12).

Appellant called several witnesses, and took the stand and testified that he did not commit the crimes (Tr1332, 1334, 1338, 1345, 1358, 1370, 1389, 1414).

In rebuttal, the state called Misty Bolin (Tr1441).

At the close of the guilt phase evidence, instructions, and arguments of counsel, the jury found appellant guilty of all three counts of murder in the first degree (Tr1511).

Trial Evidence: Penalty Phase

During penalty phase, the prosecutor called Mike Wagner, who testified that in February and March of 1999, he shared a cell with appellant, and appellant forced Mr. Wagner to perform oral sex on him, and on two other occasions, sodomized Mr. Wagner by putting his penis into Mr. Wagner's anus (Tr1549, 1551-52). The prosecutor called cell-mate Robert Milner, who testified that on two nights, he woke up hearing voices coming from appellant's bunk, saw something bumping the blankets, and saw that appellant and Mr. Wagner were in appellant's bed (Tr1572-74).

The prosecutor called Ms. Brouk's younger sister, Joy Lemoine, to give victim impact testimony (Tr1589-95).

Appellant called a cell-mate, 1598). his mother, brother, and aunt, ex-girlfriend, and Dr. Wanda Draper (Tr1598, 1607-1609, 1627-34, 1640, 1647-48, 1668-74).

At the close of penalty phase, the jury found four aggravating circumstances for the murder of Ms. Brouk (Tr1726-27), three aggravating circumstances for the murder of Adrian (Tr1728), and three aggravating circumstances for the murder of Kyle (Tr1729). The jury assessed punishment at death for each count of murder in the first degree (Tr1726-28). At the sentencing hearing on October 8, 1999, the court imposed punishment in accordance with the jury verdicts (Tr1735, 1750-51).

Further proceedings

Appellant appealed his convictions and sentence, and this Court affirmed his convictions and sentence of death on June 26, 2001. State v. Christeson, 50 S.W.3d 251 (Mo.banc2001).

On November 15, 2001, appellant filed his pro se motion for postconviction relief (PCRL.F. 1, 4). On March 11, 2002, counsel for appellant filed an amended motion for postconviction relief (PCRL.F. 1, 15). An evidentiary hearing was held on September 30-October 1, 2002 (PCRTri, PCRL.F. 3). On April 23, 2003, the motion court issued findings of fact and conclusions of law, denying appellant's motion for postconviction relief (PCRL.F. 3, 772). This appeal follows.

ARGUMENT

POINT I

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds of trial counsel's not calling four witnesses to testify because their testimony of specific acts of violence performed by Carter was inadmissible because prior bad acts are not admissible to prove propensity, and because their testimony of Carter's reputation for untruthfulness was cumulative in that Carter admitted that he lied to police and doctors about his participation in the rape and murders.

Appellant's claim of trial court error should not be reviewed by this Court because it was addressed on direct appeal, and appellant bases his claim on evidence that was never presented to the trial court.

For his first point on appeal, appellant claims the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to present the testimony of four witnesses in guilt phase, and denying a claim of trial court error for not granting a continuance (App.Br. 38).

1. Standard of review

Appellant has lumped five disparate claims of error into one point (App.Br. 38). This violates the rules of appellate briefing. State v. Thompson, 985 S.W.2d 779, 784, note 1 (Mo.banc1999). Therefore, appellant's claim is reviewable, if at all, for plain error

only. Id. "Under the plain error rule, 'Appellant must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.'" State v. Worthington, 8 S.W.3d 83, 87 (Mo. banc1999).

Had appellant's claim been preserved, review of the motion court's action would have been limited to a determination of whether the findings and conclusions of the court were clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003). In this review the court's rulings are presumed correct, and will be found clearly erroneous only if, upon a review of the entire record, the appellate court is left with "a definite and firm impression that a mistake has been made." Wilson v. State, 813 S.W.2d 833, 835 (Mo.banc1991).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was unreasonable, and that such unreasonable performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). "The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc2001), Strickland v. Washington, 466 U.S. at 686.

> The defendant has a heavy burden in proving ineffective assistance. . . . The reviewing court presumes that the trial attorney's conduct was reasonable and was not ineffective. Reasonable choices of trial strategy, no matter how ill fated they

appear in hindsight, cannot serve as a basis for a claim of ineffective assistance. Clayton v. State, 63 S.W.3d at 206. "[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Id. at 208, Strickland v. Washington, 466 U.S. at 690.

2. Trial counsel's actions were reasonable

At the hearing on appellant's postconviction motion, trial counsel Scott McBride testified that he knew of Jesse Carter from the very start and the contents of his confession to police, and knew three weeks before trial that he had agreed to testify against appellant in exchange for waiver of the death penalty (PCRTr132-33, Aug.19,1999Tr4). He said he only learned of people that would know Carter after he deposed Carter, and he did not have time to talk to them before trial (PCRTr134-35). Trial counsel Valerie Leftwich said that all during preparation for trial she investigated Carter, by questioning at least his mother, David Bolin, and appellant about him, and examining his court file (PCRTr277-79).

Appellant lived in the same house with Carter on Bolin Hill for two years, they spent time with girls together, and went hunting together (Tr963, 1399, 1404, 1648), so appellant could be expected to have some idea of the people who might know Carter. Had appellant informed his trial counsel about these individuals, trial counsel could have investigated them before trial. Middleton v. State, 103 S.W.3d 726, 740 (Mo.banc2003) (trial counsel not ineffective for failing to call witness where movant did not prove he

told trial counsel of the existence of the witness). The first time trial counsel could depose Carter and learn of these individuals was after Carter reached the agreement with the state. Thus, trial counsel's investigation was reasonable under all the circumstances. Therefore, his point must fail.

3. In any event, the character and credibility testimony of the witnesses was either inadmissible or cumulative

Respondent will address each witness in turn.

A. Kyle Burgess

Kyle Burgess testified never testified about whether Carter had a reputation for violence and turbulence. He testified that Carter had a reputation for selling drugs, and that his reputation for truth and veracity was "none" (App.Exh.19, pg. 13-14). He said Carter once offered him marijuana, that Carter had been in one fight that he knew of, and that it was likely Carter had been in more fights because of "the people he hung around with" (App.Exh.19, pg. 9). He said that Carter never attacked him alone, but always had two-to-three people with him at those times (App.Exh.19, pg. 10, 14-15). He said Carter had never actually touched him, but he once threw a punch at him, which Mr. Burgess blocked, and then Carter pulled out a pocketknife, which ended the fight (App.Exh.19, pg. 10-12, 14-15).

The motion court denied this claim, finding that the testimony of Mr. Burgess would not have given appellant a viable defense, and would only have reinforced the

state's theory that Carter was a follower who never attempted violence on his own (PCRL.F. 929).

The motion court did not plainly err. The testimony about Carter's reputation for selling drugs and his specific acts of violence was inadmissible character evidence, because it would have been offered solely to show Carter's bad character. State v. Wolfe, 13 S.W.3d 248, 258 (Mo.banc2000) (generally, specific acts of witness or reputation for moral degeneracy may not be used for impeachment). The testimony about Carter's poor reputation for truth and veracity, which appellant wanted to use to impeach his statement about the crimes, was cumulative to Carter's own admission that he lied to several people about the crimes (Tr962-63, 1018-20). "Counsel is not ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc2000). Therefore, trial counsel was not ineffective for not present this testimony.

In any event, appellant did not suffer manifest injustice or Strickland prejudice from the lack of this evidence. This evidence showed that Carter would be violent only when a peer encouraged him to be, which fit perfectly with the state's theory that appellant was the leader in the planning and carrying-out of the robbing, rape, and murders. Testimony about a specific time when Carter had thrown a punch and then pulled a knife, but gone no further, also reinforced this theory by giving a specific example where Carter made threats but would not carry-through on those threats, thus showing that it was appellant's pressure which caused Carter to help him in the crimes.

The jury already knew Carter was a vile person, who helped plan the robbery and rape of Ms. Brouk, held her children at gunpoint while appellant raped her, and helped appellant perform the acts which savagely killed each person. There is no reasonable probability that this comparatively slight evidence of Carter's character would have any effect on the verdict. Therefore, appellant's claim must fail.

B. Amber Burgess

Amber Burgess testified that she dated Carter for about six months when she was in 8th or 9th grade (App.Exh.18, pg. 6-7). She did not know his reputation for truth or veracity, but did know that one day he was talking to girls at a park and then denied it to her (App.Exh.18, pg. 11-12). She said that after they had dated for a month or two, Carter began to order her around, follow her to make sure she went where she said she would go, get angry when she talked even to her brothers, squeeze her arm or leg so tight it caused bruises, hit her, and threatened her with a baseball bat, although he never hit her with an object or choked her (App.Exh.18, pg. 8-12). She said that once she refused to have sex with him, and he threatened her with a knife, but stopped when he heard a noise in the house, and another time, tied her hands with his tie, unzipped her pants and tried to pull them down, but stopped when his sister came in (App.Exh.18, pg. 13-14). She testified that he wrote her a letter from prison (which she no longer had) saying if she had any other man he would kill her and him when he was released from prison (App.Exh.18, pg. 15).

The motion court denied this claim, finding that the evidence was not relevant or mitigating and would not have provided appellant with a viable defense (PCRL.F. 928).

The motion court did not plainly err. The testimony about Carter's specific acts of violence, sexual assault, and lying are inadmissible character evidence because their only relevance is to show Carter's bad character and propensity to do those things. State v. Wolfe, 13 S.W.3d at 258.

In any event, appellant did not suffer manifest injustice or Strickland prejudice from the lack of this evidence. Evidence that Carter once lied to his girlfriend about having talked to other girls has almost no weight in comparison to Carter's own admission that he lied about the crimes to several people. Evidence that Carter tried to sexually assault his girlfriend, while certainly heinous, would not have an effect on the jury's verdict, where the jury had already heard that Carter helped plan the rape of Ms. Brouk and held her children at gunpoint while appellant carried out the rape, and the condition of the crime scene and Ms. Brouk's body and the DNA evidence established that appellant and not Carter raped Ms. Brouk (Tr1143-48). Finally, evidence about Carter's specific acts of violence towards Ms. Burgess, while certainly bad acts, were not nearly as bad as what the jury had already heard about how Carter helped murder two children and their mother. There is no reasonable probability that the admission of this evidence would have had any effect on the jury's verdict. Therefore, appellant's claim must fail.

C. Amanda Burgess

Amanda Burgess testified that she did not know Carter, but she knew of him, and that she knew his reputation for truth and veracity was "not very good" (App.Exh.17, pg. 7). She participated in a program with the sheriff's department, and had overheard other sheriffs say Carter's name on several occasions (App.Exh.17, pg. 9-10). She said that usually when they talked about someone, it was because they had been in trouble, but she did not hear what they actually were saying about Carter or why they mentioned his name (App.Exh.17, pg. 11). She said that an "establishment" across the street from her house was known for selling drugs, and she had heard Carter's "name being yelled across the yard," but had never seen him there (App.Exh.17, pg. 10).

The motion court denied this claim, finding that her testimony "would not have been persuasive nor helpful" to appellant, and would not have provided him with a viable defense (PCRL.F. 930).

The motion court did not plainly err. Because she did not know what officers were saying about Carter when they mentioned his name or why his name was being yelled across the yard, this testimony had no probative value, and was therefore irrelevant. State v. Wolfe, 13 S.W.3d at 258; State v. Hutchison, 957 S.W.2d 757, 763 (Mo. banc1997) (evidence is relevant only if it tends to prove or disprove a fact at issue). Her opinion that Carter's reputation for truthfulness was not good was cumulative to Carter's admission that he lied to others about the crimes (Tr962-63, 1018-20).

Skillicorn v. State, 22 S.W.3d at 683. Appellant claims this testimony was "especially powerful" because it came from her working with the police (App.Br. 45) is wrong; her knowledge of Carter's reputation came from going to the same school with him, and she said she did not know him at all, but only knew of him (App.Exh.17, pg. 7).

In any event, for the same reasons– the evidence had no probative value or was cumulative– appellant did not suffer manifest injustice or Strickland prejudice from the lack of this evidence. Further, while Carter's testimony certainly reinforced the physical evidence and eye-witness testimony proving that appellant committed these crimes, even without Carter's testimony, the evidence was overwhelming that appellant raped Ms. Brouk, that he and Carter robbed her and murdered her and her children in a horrendous manner, and that he and Carter fled together. Therefore, appellant's claim must fail.

D. Christopher Pullen

At the hearing on appellant's motion for postconviction relief, Christopher Pullen testified that he met Carter "very seldom" (PCRTr33). He said that once Carter tried to sell him marijuana, and when Mr. Pullen refused, Carter said he would "kick [his] butt around" (PCRTr32-34). Mr. Pullen said he had heard Carter say the same thing to someone else one other time (PCRTr34). Mr. Pullen said that he had heard about Carter getting into fights, but had never actually seen him physically violent with anyone (PCRTr34).

The motion court denied this claim, finding that Mr. Pullen's testimony would not

have provided appellant with a viable defense, and would have reinforced the state's theory that Carter was a follower (PCRL.F. 929-30).

The motion court did not plainly err. Mr. Pullen never testified that Carter had a reputation for violence or untruthfulness. Mr. Pullen's testimony that he had heard that Carter had been in fights did not establish that Carter had a reputation for violence and turbulence— appellant never asked this question, and for all we know, Mr. Pullen's statement may have been based on information that people would track down Carter and beat him. Mr. Pullen's testimony about Carter's prior bad acts of once offering to sell marijuana and twice threatening to "kick [someone's] butt around" was inadmissible character evidence. State v. Wolfe, 13 S.W.3d at 258. Mr. Pullen's testimony that he had never seen Carter violent with anyone was not only character evidence, but was also helpful to the state's theory that appellant led Carter into committing these crimes. Therefore, none of Mr. Pullen's testimony was admissible and some was harmful to appellant, and trial counsel was not ineffective for not offering it.

In any event, appellant did not suffer manifest injustice or Strickland prejudice from the lack of this testimony. As shown by Respondent's Statement of Facts, the evidence already proved that Carter was utterly vile— he helped appellant plan to rob and rape Ms. Brouk, he held Adrian and Kyle at gunpoint while appellant raped their mother, he agreed with appellant to kill the Brouks and forced them into the car at gunpoint, and he helped appellant perform the acts which savagely killed each child and their mother.

There is no reasonable probability that information that he also once tried to sell marijuana, twice made the playground threat to "kick [someone's] butt around," and had been in fights, would have affected the verdict. Further, evidence that Mr. Pullen had only heard Carter make threats, but had never seen Carter carry out any act of physical violence, would reinforce the state's theory that appellant was the leader in this horror, and cajoled Carter into helping him commit the crimes. Therefore, appellant's claim must fail.

3. This Court has rejected appellant's claim of trial court error

Appellant's next claim in this point is that the motion court erred in not granting his claim that the trial court erred in not granting a continuance to investigate these witnesses (App.Br. 38). However, this claim of trial court error is not cognizable in a motion for postconviction relief. Franklin v. State, 24 S.W.3d 686, 693 (Mo.banc2000); Clemmons v. State, 785 S.W.2d 524, 531 (Mo.banc1990). Further, appellant is collaterally estopped from relitigating this issue because this claim was addressed and rejected by this Court on direct appeal. State v. Christeson, 50 S.W.3d 251, 261-62 (Mo.banc2001).

Appellant argues that this Court should look at his same claim yet again because he has now adduced further evidence to support the continuance (App.Br. 47), but the trial court cannot be faulted for not considering evidence never presented to it. *See* State v. Tokar, 918S.W.2d753, 762 (Mo.banc1996) (inappropriate to attempt to supplement

record with documents trial court never considered). Further, as shown above, all the evidence was inadmissible or cumulative, so appellant suffered no manifest injustice from the trial court's denial of the continuance. Therefore, his claim has no merit, and must fail.

POINT II

The motion court did not clearly err in denying appellant's motion for postconviction relief claiming ineffective assistance of counsel on grounds that trial counsel did not call Michael Gibbs because the decision was based on reasonable trial strategy in that Mr. Gibbs told trial counsel that if he were called he would offer testimony on the stand to help appellant get the death penalty. In any event, appellant did not suffer Strickland prejudice.

For his second point on appeal, appellant claims that the motion court clearly erred in denying his claim that his attorney was ineffective for not calling Michael Gibbs to testify during penalty phase (App.Br. 49).

1. Facts

At trial, in penalty phase, the state called Robert Milner (Tr1571). Mr. Milner testified that he had shared a jail cell with appellant and Mike Wagner, the man appellant forcibly sodomized (Tr1572). Mr. Milner testified that appellant put blankets up around his bunk bed, and on two occasions he woke up, saw something bumping the blankets, and heard voices (Tr1572-74). Mr. Milner said that another time he heard appellant and Mr. Gibbs together, chuckling, and appellant said, "Of course I did, but they ain't got shit on me." (Tr1575-76). Mr. Milner said he did not know to what appellant was referring (Tr1576).

In his motion for postconviction relief, appellant claimed that his attorneys should

have called Mr. Gibbs to deny that appellant made the statement (PCR L.F. 167-68).

At the hearing on appellant's motion, appellant's trial counsel testified she did not ask Mr. Gibbs whether appellant had confessed, Mr. Gibbs told her appellant did not make the statement, and she did not call him because he did not want to testify, and threatened to say "anything else that he could say hurtful to [appellant]" if called (PCRTr271-72, 394-95).

In his deposition, Mr. Gibbs testified that he told trial counsel that appellant had never confessed and appellant did not make the statement, but refused to testify (App.Exh.28 pg. 13-14). He said that he was only willing to testify at the deposition because postconviction counsel given him information that appellant's co-defendant had committed the crimes alone and that appellant had nothing to do with the crimes (App.Exh.28 pg. 10-11). Mr. Gibbs admitted he had convictions of tampering with a car, assault in the first degree, armed criminal action, murder in the first degree, and escape from confinement (App.Exh.28 pg. 5).

The motion court denied appellant's claim, finding that Mr. Gibbs was unavailable at the time of trial, his purported reason for coming forward now was not credible, and therefore counsel was not ineffective for not calling an unavailable witness (PCR L.F. 925).

2. Standard of review

Review of the motion court's action is limited to a determination of whether the

findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was unreasonable, and that such unreasonable performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). "[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Clayton v. State, 63 S.W.3d 201, 208 (Mo.banc2001), *see also* Strickland v. Washington, 466 U.S. at 690.

3. Because Mr. Gibbs refused to testify and threatened to hurt appellant's case if called, the decision not to call him was based on reasonable trial strategy

Mr. Gibbs told trial counsel he would not testify for appellant, and said that if he were called, he would say whatever he could to damage appellant's case (App.Exh.28 pg. 10, PCRTr271-72). Trial counsel could justifiably be concerned that, even if she could control Mr. Gibbs during direct examination, he would be a loose cannon when it came time for the prosecutor to cross-examine him. The value of his testimony was extremely minimal; all he could do was claim appellant did not make a vague statement to him, and his credibility, in light of his many serious convictions, was poor. Therefore, trial counsel's decision not to call Mr. Gibbs was based on reasonable trial strategy, and the motion court did not clearly err in denying appellant's claim.

Appellant relies on Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981), for the

proposition that trial counsel should have forced Mr. Gibbs to testify (App.Br. 54). In Eldridge, trial counsel never talked to an alibi witness, but heard through someone else that the witness would rather not testify. Id. at 235. In contrast, in the case at bar, trial counsel talked directly to Mr. Gibbs, who refused to testify and said he would harm appellant's case if called, and Mr. Gibbs was not a disinterested alibi witness, but a friend of appellant's with a criminal record similar to appellant's whose only evidence to offer was that appellant did not make a vague statement. Eldridge does not require trial counsel to call witnesses that have very little to offer by way of testimony or credibility and who threaten to harm the case.

Appellant claims trial counsel should have told Mr. Gibbs that appellant was innocent, and then Mr. Gibbs would have testified at trial (App.Br. 54-55). However, the motion court found Mr. Gibbs's stated reason for changing his mind incredible (PCRL.F. 925). State v. Simmons, 955 S.W.2d 752, 773 (Mo.banc1997) ("We give deference to the motion court's superior opportunity to judge the credibility of the witnesses."). Therefore, even if trial counsel had tried to convince him that appellant was innocent, it would have had no effect on whether Mr. Gibbs was available to testify. Further, it is not ineffective assistance to refuse to behave unethically, and lying to Mr. Gibbs, telling him that appellant had nothing to do with the rape and murders when the inescapable conclusion from a review of the evidence is that appellant did commit these crimes, is unethical. Supreme Court Rule 4-8.4(c) ("It is professional misconduct for a lawyer to: .

. . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .").

4. In any event, appellant did not suffer Strickland prejudice

There is no reasonable probability that the result of the penalty phase would have been different, even if counsel had called Mr. Gibbs, even if Mr. Gibbs had been willing to testify, and even if Mr. Gibbs did not give the jury other negative information about appellant. The statement itself, "Of course I did, but they ain't got shit on me," was vague, and Mr. Milner admitted that he had no idea to what the statement referred (Tr1576). Also, Mr. Gibbs was a friend of appellant, was serving a life sentence, and had many serious convictions, including murder in the first degree and escape from confinement (Tr1575-76, May25Tr14, App.Exh.28 pg. 5), and was thus completely lacking credibility. In light of the extremely compelling evidence that appellant not only raped Ms. Brouk while her children were held at gunpoint, but slit her throat just deep enough so she could live to see him cut, shoot, drown, and suffocate her children, before throwing her on top of their bodies to drown, there is no reasonable probability that if the jury had heard another convicted murderer claim appellant did not make some vague statement regarding who knows what their verdict would have been any different. Therefore, appellant's point has no merit, and must fail.

POINT III

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds that trial counsel did not ask Dr. Patricia Carter whether Jesse Carter had told her that he had out-of-body experiences and could move like a spirit because appellant did not rebut the strong presumption that the decision not to elicit the statements was based on reasonable trial strategy and appellant did not suffer Strickland prejudice because the testimony was cumulative and immaterial.

For his third point on appeal, appellant claims the motion court clearly erred in denying his claim that in guilt phase counsel should have questioned Dr. Carter about Jesse Carter's claims to have out-of-body experiences and the ability to move like a spirit (App.Br. 58). In his amended motion for postconviction relief, appellant claimed that this evidence would show the jury that Jesse Carter did not have the ability to testify truthfully or accurately (PCRL.F. 184). Appellant appears to be arguing that if the jury had heard this testimony, the jury might have thought that Jesse Carter was insane, and therefore could not accurately tell what was going on as he helped appellant rob, rape, and murder the Brouks (App.Br. 60).

1. Facts

At trial, Jesse Carter took the stand and admitted that he lied to Dr. Carter and two other doctors (Tr962-63, 1043-58, 1065). On cross-examination, appellant's trial counsel

elicited evidence that Jesse Carter "always" talked to himself, claimed to hear voices, to see things, and to hear a roar like a beast (Tr1058-59). On re-direct, the prosecutor elicited evidence that the "roaring" was due to an ear problem (Tr1065-66). Appellant's trial counsel called Dr. Carter, who had examined Jesse Carter to determine whether he had a mental disease or defect (Tr1344-45). Dr. Carter related what Jesse Carter told her about the crimes and his claim to have heard voices, and testified that she found that Jesse Carter had no mental disease or defect (Tr1347-55). She also said that in her experience defendants she interviews often say things at odd with police reports, and she was not here to discuss the veracity of Jesse Carter's statements to her (Tr1353-54). Appellant also called Dr. Lester Bland, who related what Jesse Carter told him about the crimes, said that Jesse Carter claimed to have auditory and visual hallucinations but Dr. Bland determined that these were not due to psychosis, but were simply a dream state, and that Jesse Carter had borderline intellectual functioning, but no mental disease or defect (Tr1361-68).

At the hearing on appellant's postconviction claim, trial counsel testified that he could not recall why he did not ask Dr. Carter about Jesse Carter's additional claims (PCRTr139).

The motion court denied appellant's claim, finding that the testimony would have reinforced the prosecution theory that Jesse Carter was a follower, and would not have provided appellant with a viable defense (PCRL.F. 931).

2. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

"Reasonable choices of trial strategy, no matter how ill fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc2001). "[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Id. at 208, *see also* Strickland v. Washington, 466 U.S. at 690.

3. Appellant has not rebutted the strong presumption that trial counsel's actions were based on reasonable trial strategy

Trial counsel Scott McBride never denied having a trial strategy reason for not asking these questions, he only said he could not recall why he did not (PCRTr139).

> Where, as here, a movant's trial counsel does not remember the reasons for making a strategic decision, there is a failure to overcome the "strong presumption" that the decision was made as part of a reasonable trial strategy and the movant fails to meet the burden to demonstrate that the challenged actions were outside the scope of professionally competent assistance.

Clark v. State, 93 S.W.3d 455, 460 (Mo.App.S.D.2003); Fretwell v. Norris, 133 F.3d 621, 627-28 (8th Cir. 1998) (using counsel's inability to recall his reasons for his actions as

evidence of ineffective assistance violates Strickland's presumption that an attorney performed reasonably). Appellant has not proven that there was no trial strategy reason for trial counsel's decision. Perhaps trial counsel thought it was obvious to the jury that Jesse Carter fabricated his symptoms of mental illness because Jesse Carter knew that if these doctors found him insane he could escape conviction. Asking even more questions about Jesse Carter's specific claims would not cause the jury to believe that Jesse Carter was insane, but would simply annoy the jury. Because appellant has not rebutted the strong presumption that trial counsel's actions was based on reasonable trial strategy, the motion court did not clearly err in denying his claim, and his point must fail.

4. In any event, appellant has not shown Strickland prejudice

Trial counsel elicited evidence that Jesse Carter claimed to hear voices and a "roaring," and that he had visual and auditory hallucinations (Tr1058-60, 1354-55, 1361-62). Additional evidence that Jesse Carter also told these doctors that he had out-of-body experiences and thought he could move like a spirit is simply more of the same type of material– Jesse Carter's attempts to avoid conviction by lying to doctors in an effort to be found insane. Both doctors found that Jesse Carter had no mental disease or defect (Tr1354, 1367-68). Evidence that he made these claims was merely cumulative to the other evidence that he told his doctors that he saw and heard things, and had no weight in light of Jesse Carter's motive for malingering and the doctor's conclusions that he had no mental disease or defect. Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc2000)

("Counsel is not ineffective for not putting on cumulative evidence.").

Further, even if appellant's outlandish proposition is accepted— that hearing two more of Jesse Carter's claims would have caused them to turn from accepting his testimony at face value to believing that he was insane and unable to know what happened– in light of the overwhelming physical evidence and eye-witness testimony which proved that appellant was the one who raped Ms. Brouk and that he and Jesse Carter took them to the pond, killed them there, and then fled together, there is no reasonable probability that the jury's verdict would have been different. Instead, if the jury believed Jesse Carter was insane, it would have had even more reason to conclude that appellant must have been the one who masterminded the rape, murders, and escape, and cajoled a mentally ill Jesse Carter into helping him. Therefore, appellant's point must fail.

POINT IV

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds that trial counsel did not properly make multitudinous objections.

For his fourth point on appeal, appellant claims the motion court erred in denying his claim that trial counsel was ineffective for not properly making many objections in voir dire and guilt phase (App.Br. 62-71).

1. Standard of review– appellant's claims are not preserved and should not be reviewed

Appellant's point relied on lists four general headings and gives a generalized statement that counsel should have objected to that type of testimony. Even referring to the argument section of this point, it is impossible to tell what claims appellant is actually raising because he simply summarizes pages of testimony and then claims there should have been objections to everything (App.Br. 63-71). This type of briefing fails to comply with Supreme Court Rules 30.06(c) and 84.04(d), and renders his claims unpreserved. State v. Cella, 32 S.W.3d 114, 119 (Mo.banc2000); State v. Fergusen, 20 S.W.2d 485, 498 (Mo. banc2000) (public defender's office raised "laundry list" of claims of closing argument error, most of which were "frivolous," some "even sanctionable"); State v. Ervin, 979 S.W.2d 149, 161-63 (Mo. banc1998) (appellant's point listing twenty claims of error violated rules and would be reviewed for plain error only); Thummel v. King,

570S.W.2d679, 686 (Mo.banc1978); Mello v. Williams, 73S.W.3d681, 685 (Mo.App.E.D.2002).

Under Supreme Court Rule 30.20, this Court may decline to review claims of plain error which do not, on their face, provide substantial grounds for believing manifest injustice or miscarriage of justice has occurred. State v. Bucklew, 973S.W.2d83, 93 (Mo. banc1998); State v. Nicklasson, 967S.W.2d596, 615 (Mo. banc1998). None of appellant's claims, on its face, raises substantial grounds for believing a manifest injustice or miscarriage of justice resulted from the trial court's ruling or action. Therefore, this Court should not review appellant's point.

2. In any event, appellant's claims have no merit

Respondent has attempted to discern appellant's claims, and will address them in turn below.

A. Prosecutor's questioning regarding Jesse Carter's statements

At trial, during appellant's cross-examination of Carter, appellant impeached Carter's testimony with questions suggesting his confession to police was a lie only made to avoid the death penalty and because Sgt. Roark repeatedly told him his initial denial was "bullshit" and refused to let him explain what happened (Tr1018-43, 1060-63), by eliciting in detail the different statement he told Dr. Carter (Tr1043-53), bringing out in detail the different statement he told Dr. Bland (Tr1053-60), including his statement that he made a false statement to police to protect his family (Tr1054), and reported

hallucinations to him (Tr1058-60).

On re-direct examination, the prosecutor asked if Carter's second statement to police was "the truth," and Carter said, "Most of it, yes." (Tr1064). Trial counsel objected and it was overruled (Tr1064). The prosecutor also asked Carter about his denials to three doctors as follows: "And you didn't tell them what really happened, did you?" to which Carter replied, "No." (Tr1065). Trial counsel's objection to this testimony was overruled (Tr1065).

When the state re-called Sgt. Roark, he testified on direct examination that Carter initially denied involvment, that Sgt. Roark never used the term "bullshit" with him, that Sgt. Roark indicated that he did not believe his denial of involvement, and at that time Carter admitted what he and appellant did (Tr1289-90).

It was entirely proper for the prosecutor to address appellant's attempt to impeach Carter's credibility, by asking, on redirect examination, about which statements were true and which were lies, and to address appellant's claim that Sgt. Roark refused to let appellant tell his story by asking Sgt. Roark how the second statement came about. Appellant cites no law which prohibits witnesses from identifying which of their prior statements are true, and it is proper to explain to the jurors the circumstances under which prior inconsistent statements were made so they can weigh the credibility of the statements. *See, e.g.,* State v. Griggs, 999 S.W.2d 235, 243-44 (Mo.App.W.D.1998) (circumstances of child sexual assault victim recanting were for jury to consider).

Appellant argues that the statements were vouching and bolstering (App.Br. 64-65). This is incorrect. Vouching occurs when prosecutors imply they have special facts the jury does not know about. State v. Wolfe, 13 S.W.3d 248, 256 (Mo.banc2000). Bolstering occurs when a witness testifies at trial, and an out-of-court statement is introduced that entirely duplicates the live testimony. State v. Silvey, 894 S.W.2d 662, 672 (Mo.banc1995). Because the prosecutor never implied special knowledge and the statements about which the prosecutor questioned Carter were inconsistent statements, there was no vouching or bolstering.

Appellant relies on State v. Link, 25 S.W.3d 136, 143 (Mo.banc2000), in which a prosecutor elicited evidence that a police officer did not believe the witness actually saw the victim. This case is distinguishable, because in the case at bar, appellant was the one who first introduced evidence that Sgt. Roark told Carter he did not believe his denial (Tr1018-43, 1060-63). Thus, the prosecutor's later questioning to address the issue appellant raised was proper, and could not have prejudiced appellant. State v. Bucklew, 973S.W.2d83, 93 (Mo. banc1998) (a defendant suffers neither prejudice nor reversible error where evidence is improperly admitted if the evidence properly before the court establishes essentially the same facts).

Accordingly, the motion court did not plainly err in denying appellant's claims (PCRL.F. 818-21).

B. The prosecutor's cross-examination of appellant was proper

Appellant next argues that trial counsel's objections to the form of the question when the prosecutor used of the phrase "you want us to believe" while questioning appellant (Tr1414, 1418, 1420, 1423) were insufficient because trial counsel also should have objected on grounds that the phrase "implied knowledge of [his] guilt and improper expression of opinion" (App.Br. 66-67).

The motion court denied this claim, holding:

> This Court expressly finds that the witness [trial counsel Valerie Leftwich] was not credible when she repeatedly stated that she doesn't have a reason for not objecting. The Court's observations was that she was very quick to assert she had no reason and was prepared to make that response without any reflection on the events that occurred at trial. . . . It appears that Ms. Leftwich continues to be an advocate for movant by claiming to be ineffective.

(PCRL.F. 835-36). The motion court also found that the prosecutor's "manner of questioning" was permissible, "it is highly unlikely that any objection from trial counsel would have been sustained," and "in light of the overwhelming evidence of movant's guilt, there is no reasonable probability that there would have been a different result at movant's trial had trial counsel objected" (PCRL.F. 836).

Appellant has not proven that trial counsel did not have a reasonable trial strategy for not objecting; the motion court found that trial counsel was not credible when she

claimed to have no reason. State v. Twenter, 818 S.W.2d 628, 635 (Mo. banc1991) (reviewing court gives deference to motion court's findings on credibility). Trial counsel may not have wanted to annoy the jury with unwarranted objections– the prosecutor's question does not imply any secret knowledge or express a personal opinion, so objecting on these grounds would have been an exercise in futility. State v. Tokar, 918S.W.2d753, 768 (Mo.banc1996) ("It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good."); State v. Clay, 975 S.W.2d 121, 135 (Mo.banc1998) ("Counsel will not be deemed ineffective for failing to make non-meritorious objections"); State v. Leisure, 749 S.W.2d 366, 378 (Mo.banc1988) ("Great latitude is allowed in the cross-examination of a witness with respect to credibility"). Therefore, the motion court did not plainly err in denying this claim.

Appellant next complains about this exchange:

Q. Isn't it true that the first time that you decided that you had sex with Susan Brouk was after you heard about the DNA results?

A. No, sir.

(Tr1424).

Trial counsel testified she did not object to this because appellant answered "no" (PCRTr363-64), and the motion court found this was reasonable trial strategy and appellant was not prejudiced because he responded "in a way that supported his theory of

defense" (PCRTr837-38).

Deciding not to object was reasonable when appellant simply answered the prosecutor's question in the negative and trial counsel had already helped appellant ascribe other reasons to his not making this claim earlier (Tr1421, 1424). Therefore the motion court did not plainly err in denying this claim.

C. Dr. Bland's testimony that he found Carter competent

At trial, appellant called Dr. Bland and questioned him about Carter's claims to have hallucinations (Tr1362-62). On cross-examination, the prosecutor asked why he examined Carter, and Dr. Bland replied in order to determine Carter's "competency to stand trial, . . . did he have any kind of mental disease or defect that would impair his ability to understand the goings on in the courtroom," and his criminal responsibility for the crimes (Tr1367). The prosecutor asked: "Did you find that he's capable of assisting in his own defense?" and Dr. Bland said he did (Tr1368).

In his motion for postconviction relief, appellant claimed trial counsel should have objected to the prosecutor's asking Dr. Bland if Carter could assist in his own defense (PCRL.F. 68). Appellant argued that "this left the misleading impression . . . that because Carter had been found competent to stand trial, the jury should not, as a matter of law, consider Carter's mental disorders . . . in assessing his credibility (PCRL.F. 68).

The motion court denied this claim, finding that appellant had not rebutted the strong presumption that the decision not to object was reasonable trial strategy, that the

prosecutor's question was proper to address the inferences raised by appellant's questioning, and there was no prejudice because the evidence of guilt was overwhelming (PCRL.F. 834-35).

The motion court did not plainly err. After appellant questioned Dr. Bland in an attempt to show that Carter was crazy, it was proper for the prosecutor to address this by showing that Carter's only mental diagnosis was borderline mental functioning and he had no mental disease which would prevent him from knowing right and wrong or assisting in his defense (Tr1367-68). Therefore, any objection would have been meritless. State v. Clay, 975 S.W.2d at 135 ("Counsel will not be deemed ineffective for failing to make non-meritorious objections").

For the first time on appeal, appellant claims that there is a legal distinction between competency to stand trial and competency to testify, and an objection should have lodged based on this legal distinction (App.Br. 70). However, "[c]laims which were not presented to the motion court cannot be raised for the first time on appeal." Amrine v. State, 785 S.W.2d 531, 535 (Mo. banc1990); State v. Clay, 975 S.W.2d at 144.

Allowing a movant to present new claims on appeal is allowing him to file a second, untimely motion for postconviction relief. This is clearly prohibited by the rule and by this Court's cases. Smith v. State, 21 S.W.3d 830, 831 (Mo.banc2000) ("Successive motions pursuant to Rule 29.15 are invalid."); State v. Brooks, 960 S.W.2d 479, 499 (Mo.banc1997) (supplementary Rule 29.15 pleadings); State v. Weaver, 912

S.W.2d 499, 520 (Mo.banc1995) (Rule 29.15 time limits for filing are valid and mandatory). Therefore, appellant's new claim should not be reviewed.

In any event, the claim is without merit. The jury was never told that it was prohibited from considering all the evidence in determining Carter's ability to perceive what was going on when he and appellant committed these crimes, and the prosecutor's questioning concerned the facts, not the law (Tr1367-68). Therefore, appellant's argument that the jury might have been deceived by the legal term (App.Br. 70) has no merit. His arguments that this constituted an expert endorsement of Carter's testimony (App.Br. 70) is ridiculous– Carter lied to Dr. Bland about the facts of the crimes, and Dr. Bland's testimony came nowhere near telling the jury, "I believe Carter's trial testimony about the facts of the crimes." Finally, even if the legal conclusion that Carter was competent might was irrelevant (App.Br. 70), Dr. Bland's mental diagnoses of Carter were relevant, especially after appellant's questioning. Therefore, there was no plain error.

D. Prosecutor's voir dire explanation of the death penalty process

Appellant makes no attempt to quote the prosecutor's voir dire statements which he claims told the jury the state was relieved of its burden of proof; he merely lists ten pages of transcript (App.Br. 71).

Appellant appears to be complaining about the prosecutor's description of the process the jurors would have to follow in order to impose death. The prosecutor stated

that after finding at least one statutory aggravating circumstance beyond a reasonable doubt, finding the evidence warrants the death penalty, and finding that the mitigating circumstances do not warrant the imposition of life imprisonment, the jury then reaches the last step, which the prosecutor called, "the final point of decision" (Tr66-70). Then the prosecutor stated, "And at this point you're no longer talking about proof beyond a reasonable doubt. You're talking about having heard it all, and based on everything you've heard throughout the entire trial, both phases, what should you do." (Tr70). In talking to other venire panels, the prosecutor made similar descriptions of the process, and similar statements concerning "the final point of decision" (Tr164, 261-62, 369).

The motion court denied this claim, finding:

> At the evidentiary hearing, trial counsel testified that she had no reason for not objecting to these statements. This Court expressly finds that the witness was not credible when she repeatedly stated that she doesn't have a reason for not objecting. The Court's observations was that she was very quick to assert she had no reason and was prepared to make that response without any reflection on the events that occurred at trial. The Court observed Ms. Leftwich at trial and notes that she was well prepared and a zealous and active advocate for movant. It is not credible that Ms. Leftwich gave no thought whatsoever to the numerous claims raised by movant. . . . It appears that Ms. Leftwich continues to be an advocate for movant by claiming to be ineffective. This Court, however, is not required to

believe the testimony of any witness even if that testimony is uncontradicted. (PCRL.F. 788). The motion court found that trial "counsel did not act unreasonably in not objecting," that read "in their proper context" the prosecutor's statements were "not trying to lower the State's burden" (PCRL.F. 788).

The motion court did not plainly err. The prosecutor's description of the process was accurate, *see* § 565.030, and appellant has not rebutted the strong presumption that the decision not to object to this statement was not based on reasonable trial strategy, such as not wishing to irritate the jury by making too many objections early in the trial, State v. Tokar, 918 S.W.2d 753, 768 (Mo.banc1996), especially knowing that she, the judge, and the instructions would also describe the process to the jury.

Further, because the prosecutor's description was not incorrect, he could not have been prejudiced from trial counsel's not objecting. Therefore, his claim must fail.

Appellant also claims that trial counsel was ineffective for not making a record as to a comment the prosecutor allegedly made to her (App.Br. 68-69). However, appellant put on no evidence as to the content of any statement, and even if a statement was made, the jury did not hear it, as shown by the evidence that neither the judge, court reporter, and one of appellant's co-counsel heard it (Tr1424, PCRTr183). Therefore, the motion court did not plainly err in finding that appellant failed to prove that a statement was made or that the jurors heard it, and therefore failed to show prejudice (PCRL.F. 838-39).

POINT V

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel based on appellate counsel's not raising several claims.

For his fifth point on appeal, appellant claims the motion court clearly erred in denying several appellate counsel claims raised in his motion for postconviction relief (App.Br. 72).

1. Standard of review

Appellant's point does not explain wherein and why appellate counsel's decision is grounds for reversal. Rather, he lumps several disparate claims of error into one point, and makes a conclusory assertion that reasonable appellate counsel would have raised the claims (App.Br. 72). This does not comply with Supreme Court Rules 30.06(c) and 84.04(d). State v. Cella, 32 S.W.3d 114, 119 (Mo.banc2000); Thummel v. King, 570 S.W.2d 679, 686 (Mo.banc1978); Mello v. Williams, 73 S.W.3d 681, 685 (Mo.App.E.D.2002). His lumping of numerous claims into one point also violates these rules. State v. Thompson, 985 S.W.2d 779, 784, note 1 (Mo.banc1999). Therefore, his point is not preserved, and is reviewable, if at all, for plain error only. "Under the plain error rule, 'Appellant must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.'" State v. Worthington, 8 S.W.3d 83, 87 (Mo.banc1999).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was unreasonable, and that such unreasonable performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689.

To prove ineffective assistance in the appellate context, "strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized and asserted it." Franklin v. State, 24 S.W.3d 686, 691 (Mo.banc2000).

2. Each of appellant's claims is without merit

A. Objection to arguing adverse inferences

At trial, during guilt-phase closing argument, appellant's trial counsel argued that because Adrian and Kyle's bodies did not bear marks of being bound with shoelaces or having been sexually assaulted, and said it was "information that does not fit what Jesse Carter told you" (Tr1478). He went on, saying "Ladies and gentlemen, we spent a lot of time," and the prosecutor objected "to any argument arguing adverse inference . . . from a lack of evidence" (Tr1478). The trial court said, "I'll sustain as to arguing adverse

inference, but go ahead." Appellant's trial counsel explained that he was "arguing the evidence that was presented at the time," and the court said, "I understand" (Tr1478). Then appellant's trial counsel continued his argument, arguing that it was "critical" and "important" that the crime lab did not find blood on the knife or clothing, did not test thirty-six items, did not find appellant's and Carter's fingerprints in the trailer, and did not take plaster casts of the footprints in the loose mud by the pond (Tr1479-81).

Appellate counsel, Janet Thompson, testified "I think I should have raised this" and her failure to do so, "certainly was not a strategic reason on my part . . . I simply missed them" (PCRL.F. 505-506).

The motion court denied this claim, finding the objection was proper, sustaining the objection did not alter the outcome, and "appellate counsel's deposition testimony that she simply 'missed' this issue is not credible in light of counsel's thoroughness in addressing and considering the issues on appeal." (PCRL.F. 900-901).

The motion court did not plainly err. Because the motion court found appellate counsel's testimony not credible, appellant has failed to overcome the "strong presumption" that her decision was based on sound trial strategy. "Appellate counsel has no duty to present every issue asserted in the motion for new trial, where he or she strategically decides to cull some arguments in favor of others." Holman v. State, 88 S.W.3d 105, 110 (Mo.App.E.D.2002). Indeed, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments

on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983).

Appellate counsel raised twelve points on direct appeal, one of which contained twenty-eight claims of trial error (App.Exh.1, pg. i, 63-65). She may have felt that having already raised so many claims, adding any more would push her brief beyond the point of critical mass and render her entire brief less credible to this Court. Therefore, appellant has not overcome the strong presumption that her decision was based on sound trial strategy, and his claim must fail.

Further, the objection was proper. The prosecutor's objection was not to the autopsy findings, as appellant contends, but was to the next segment of appellant's argument, where he had moved on to argue adverse inferences from lack of testing items seized and making casts of footprints. State v. Hope, 954 S.W.2d 537, 545-46 (Mo.App.S.D.1997) (improper to argue adverse inference from failure to test items). Additionally, none of appellant's comments were stricken and the trial court made no statement suggesting the jury should disregard the argument, so appellant was not prejudiced. Therefore, this claim was not so obvious from the record that any competent attorney would have raised it and would not have required reversal had it been raised, and appellant's claim must fail.

B. Susan Brouk's statement

At trial, during guilt-phase, Jesse Carter testified that while he held Kyle and

Adrian at gunpoint, appellant took Susan Brouk, who was bound, into Adrian's bedroom at gunpoint, that Ms. Brouk was wearing pants and a shirt, they remained in the room for thirty minutes, he heard bed squeaks, that when appellant and Ms. Brouk came out, her pants were around her ankles and she did not have underwear on, and that she was angry (Tr974-79). The prosecutor asked whether she said anything to appellant, and trial counsel objected on hearsay grounds (Tr979). The court overruled the objection, and Carter answered, "She said, 'You had your fun, now get out.'" (Tr979).

Appellate counsel testified that she "should have raised" the claim, and that she "had no strategic reason for not raising it" (PCRL.F. 509).

The motion court denied this claim, finding that the statement was part of the res gestae and was relevant, was not obvious, and would not have required reversal (PCRL.F. 903).

The motion court did not plainly err. Ms. Brouk's statement was not used for its truth, but rather to show the sequence of events during the crimes. State v. Sutherland, 939 S.W.2d 373, 376 (Mo.banc1997) ("A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value."); *see* State v. Chapman, 936 S.W.2d 135, 138 (Mo.App.E.D.1996) (statement offered to explain conduct is not hearsay). Also, Ms. Brouk's statement was made while under the stress of having just been raped, and therefore fits the excited utterance exception to the hearsay rule. State v. Morrow, 968

S.W.2d 100, 112, note 8 (Mo.banc1998).

In any event, appellant did not suffer manifest injustice. Carter's other testimony, the physical evidence of Ms. Brouk having no underwear on and her panties found next to Adrian's bed, and the DNA evidence from Adrian's sheets and Ms. Brouk's body showing that no one but appellant had sex with her, were overwhelming evidence of appellant's guilt of this crime. Therefore, the claim would not have required reversal, and appellant's claim must fail.

C. Objections to argument in opening statement

i. Fingerprint argument

At trial, during his opening statement, appellant's trial counsel said an examiner "found unknown prints, meaning not Susan's, not Adrian's, not Kyle's, and meaning not Mark Christeson's, not Jesse Carter's." (Tr791). The prosecutor objected on grounds that it was "now argument and is arguing a negative inference" (Tr791-92). The trial court sustained the objection, but there was no motion to strike or instruction to disregard (Tr791-92).

Appellate counsel testified that she "should have raised" this claim (PCRL.F. 504).

The motion court denied this claim, finding that appellate counsel's testimony was not credible, the objection was proper, and it was not prejudicial (PCRL.F. 900).

The motion court did not plainly err. In light of its finding appellate counsel not credible, appellant has failed to overcome the strong presumption that her decision was

based on reasonable trial strategy. Strickland v. Washington, 466 U.S. at 689.

Further, trial counsel's use of rhetoric in first stating that the prints were unknown, and then dramatically listing the people thus excluded, at least bordered on argumentative on this cold record, and may have been far more argumentative when presented live to the jury. Thus, the trial court's sustaining of the objection was proper. And, in the absence of any motion to strike or instruction to disregard, the jury was allowed to consider the entire statement, so appellant could not have suffered any prejudice from the prosecutor's objection at the end of it. Therefore, the claim was not obvious and would not have required reversal, and appellant's claim must fail.

ii. Plea bargain argument

At trial, during his opening statement, appellant's trial counsel discussed Carter's several statements for three pages (Tr786-89). Trial counsel then said, "And, interestingly, Jesse Carter, just a few short days ago changes what he said. The reason Jesse Carter changes is the deal—" (Tr789). The prosecutor objected on grounds that it was "becoming argumentative," and the trial court sustained, but immediately allowed trial counsel to rephrase and say: "On August 11th, 1999, Jesse Carter, you will find out, and the evidence will show, was made an offer for his testimony. He would not have to face the death penalty for his testimony on August 17th, 1999, the deposition occurs that changes in the story once again." (Tr790).

Appellate counsel testified she "should have raised" this claim (PCRL.F. 503).

The motion court denied the claim, finding that appellate counsel's testimony was not credible, the objection was proper, and the claim would not have required reversal (PCRL.F. 899-900).

The motion court did not plainly err. In light of its finding appellate counsel not credible, appellant has failed to overcome the strong presumption that her decision was based on reasonable trial strategy. Strickland v. Washington, 466 U.S. at 689.

Additionally, trial counsel was getting argumentative at the time of the objection, stating his personal opinion as to the reason Carter decided to talk, rather than framing his statement in terms of the facts that would be proven, so the objection was properly sustained. And, appellant was not prejudiced by the ruling, because trial counsel got his point across immediately after the objection by stating that the latest statement was precipitated by the offer to take the death penalty away. Therefore, this claim was not obvious and would not have required reversal, and appellant's claim must fail.

D. Carter's competency

Before voir dire, the court took up appellant's motion regarding Carter's competency as a witness (Tr1). Trial counsel explained that although Carter had been found competent to stand trial, "I do not believe that sufficiently addresses whether he is competent at this time to be a witness" (Tr2). The parties discussed the evidence from three psychological evaluations and Carter's deposition (Tr3-5). Then the court stated

that he had read Dr. Carter's "very long and detailed" report, and there was no indication at the time of the crime that Carter "was not fully cognizant," and that the doctors talked about how at the time of the offense he was capable (Tr6-7). After considering all the evidence, the trial court ruled that he was not "incompetent to testify" (Tr8).

Appellate counsel testified she did not remember her "thought processes" regarding this claim, and she did not know why she did not raise it (PCRL.F. 468-69).

The motion court denied the claim, finding that trial counsel specifically raised Carter's competency to be a witness as distinguished from his competency to testify, that appellant had not shown that Carter was incompetent to testify, and that appellate counsel was not ineffective for not raising this issue (PCRL.F. 821-22).

The motion court did not plainly err. Appellant's assertion that the trial court wrongly applied the competency to stand trial standard (App.Br. 78-79) is refuted by the record— trial counsel specified that the standards were different (Tr2, App.Exh.4C, pg 456), and in making its decision, the trial court twice stated that the psychologists had found Carter able to understand what was going on at the time of the crimes (Tr6-7), which is the main criteria for determining witness competency. Further, appellant has failed to rebut the presumption that Carter met this standard of competency— no psychologist found Carter was incompetent as a witness and the trial court questioned Carter before he took the stand and Carter said he understood he had to testify truthfully and that he understood the process which had led up to his testifying (Tr952-53). State v.

Brown, 902 S.W.2d 278, 286 (Mo.banc1995) (law presumes witness over ten years old competent to testify; presumption rebutted by showing witness does not understand obligation to speak truth or lacks ability to perceive, remember, or convey in words the occurrence). Because the trial court did not apply the wrong standard, the claim would not have required reversal if raised on appeal, and appellant's claim must fail.

POINT VI

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel for failing to call thirteen witnesses because the testimony of each witness was inconsistent with trial strategy in that trial counsel's strategy was to show that appellant suffered from a horrible upbringing from which he never recovered, but these witnesses said appellant's father took good care of him until he was twelve, and a month after his father's death appellant was adopted into a stable and caring family and that he was well-adjusted in this family for the five-to-six years before he committed the rape and murders.

For appellant's sixth point on appeal, he claims the motion court clearly erred in denying his motion for postconviction relief on grounds that trial counsel did not call thirteen more witnesses in penalty phase (App.Br. 80).

1. Standard of review

Appellant's point does not explain wherein and why the lack of the testimony of each of these witnesses is grounds for reversal. Rather, appellant lumps all thirteen witnesses together, and makes a conclusory assertion that reasonable trial counsel would have called them all and that the jury would have imposed life had they heard the testimony (App.Br. 80). This does not comply with Supreme Court Rules 30.06(c) and 84.04(d). State v. Cella, 32 S.W.3d 114, 119 (Mo.banc2000); Thummel v. King, 570

S.W.2d 679, 686 (Mo.banc1978); Mello v. Williams, 73 S.W.3d 681, 685 (Mo.App.E.D.2002). His lumping of numerous claims into one point also violates these rules. State v. Thompson, 985 S.W.2d 779, 784, note 1 (Mo.banc1999). Therefore, his point is not preserved, and is reviewable, if at all, for plain error only. "Under the plain error rule, 'Appellant must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.'" State v. Worthington, 8 S.W.3d 83, 87 (Mo. banc1999).

2. Law on ineffective assistance of counsel

"[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Clayton v. State, 63 S.W.3d 201, 208 (Mo.banc2001), *see also* Strickland v. Washington, 466 U.S. 668, 690 (1984).

"Reasonable trial strategy is not ineffective assistance of counsel because it did not work as hoped. Neither is it ineffective for counsel to pursue one reasonable trial strategy to the exclusion of another, even if the latter is also reasonable." State v. Knese, 85 S.W.3d 628, 633 (Mo.banc2002). Also, "[t]here is no absolute duty to present mitigating character evidence." Rousan v. State, 48 S.W.3d 576, 583 (Mo.banc2001).

3. Each of appellant's thirteen claims is meritless

At trial, appellant presented testimony from his mother, Linda Christeson, his brother, Billy Christeston, his aunt, Edna Belcher, his former girlfriend, Laura Shaw, and Dr. Draper (Tr1606, 1622, 1637, 1646-47, 1659). These witnesses gave testimony about

appellant's mother's neglecting him, appellant's reaction to his father's death, and appellant's unhappiness living with David Bolin (Tr1607-1620, 1623-35, 1639-44, 1647-48, 1667-74).

In his motion for postconviction relief, appellant claimed his trial counsel was ineffective for not calling multitudinous witnesses in penalty phase to say nice things about him (PCR L.F. 139-61, 173-74, 237-62, 272-73).

In the hearing on the motion for postconviction relief, trial counsel said her strategy was to show that appellant had dysfunctional family background (PCRTr. 252). She said she or her investigator talked to most of the Bolin Hill relatives, but as they said that life was good on Bolin Hill, and this did not fit into her theory of mitigation, she did not call those witnesses (PCRL.F. 252-60, 275, 315).

Respondent addresses each witness below.[3]

A. Terry Bolin

In his deposition, Terry Bolin said that on Bolin Hill, appellant would do what he was told, but did not put much effort into it, and that appellant would get angry, but not

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[3] Respondent notes that most of the witnesses appellant discusses in this point could do little more than say appellant was a "nice boy" and not violent, testimony which Williams v. Taylor, 529 U.S. 362, 369, 120 S.Ct. 1495, 1500 (2000), seems to suggest is of little value in mitigation.

violent (App.Exh.5 pg. 7, 13). He said in the months just before the crimes, appellant had "a lot going on" with hunting, girlfriends, and being with friends (App.Exh.5 pg. 12, 14). He said appellant was mentally "sharp as a tack" on some things (App.Exh.5 pg. 15).

Trial counsel said she talked to Terry Bolin, but did not know why she did not call him to testify (PCRTr254).

The motion court denied this claim, finding that "Terry Bolin did not provide any information that would not be cumulative to other mitigating evidence that was presented at trial." (PCRL.F. 914).

The motion court did not plainly err. Terry Bolin's testimony was not mitigating. It said that appellant was somewhat lazy, had a temper, had a very pleasant and well-adjusted life immediately before he decided to rob and rape Ms. Brouk and murder her and her children, and that he was intelligent, reinforcing the state's theory that he was the leader in the crimes. Thus, the decision not to call him was reasonable trial strategy, and appellant's claim must fail.

B. Carmen Bolin

Carmen Bolin testified that at the time of her deposition in September of 2002 she was fifteen years old (App.Exh.8, pg. 7). This would have made her twelve at the time of appellant's trial in August of 1999, and at most eleven on the day of the crimes, February 1st, 1998 (Tr1, 966). She said she had known appellant since she was five years old, that he was always nice around her, never lost his temper around her, would play games with

her, would help her with her homework about three times a week, and helped fix some plumbing (App.Exh.8, pg. 7-10).

Trial counsel testified that while investigating appellant's case, she did not talk to anyone on Bolin Hill who was less than twelve years old, and did not talk to Carmen Bolin because she was too young (PCRTr255-56). PCR counsel did not ask trial counsel why she made this decision.

The motion court denied appellant's claim, finding that Carmen Bolin "offered no evidence that is persuasive or would have altered the outcome" (PCRL.F. 915).

The motion court did not plainly err. Carmen Bolin's testimony showed that appellant was well-adjusted on Bolin Hill and had a useful, pleasant life there where he was loved and appreciated, and reinforced the idea that appellant is a predator who decided to commit these crimes simply because he wanted to. Further, trial counsel could reasonably conclude that no matter what a twelve-year-old had to say, the risk of offending the jury by putting a child on the stand to defend a rapist and murderer would be too high. Therefore, appellant did not rebut the strong presumption that trial counsel's actions were reasonable trial strategy, and his claim must fail.

C. David Bolin

David Bolin testified that he has counted appellant as his own son since appellant came to live with him immediately after his father's death when appellant was twelve (App.Exh.10, pg. 6, 21). He said that appellant was quiet at first, so he took appellant to

counseling, and spent extra time with appellant (App.Exh.10, pg. 9, 33). After awhile, appellant became a normal part of the family, playing with the other kids, going on family vacations, and doing his chores of cleaning his room, taking out the trash, mowing the lawn in summer, and cutting wood for the woodburning stove in winter (App.Exh.10, pg. 9, 15, 21). He and many other family members attended appellant's high school graduation (App.Exh.10, pg. 22-23).

He also said that appellant would get angry, yell, and have to go to another room to cool off, that appellant moved out and then starting cutting classes, so he went to appellant and said he had to come back home because he was not fulfilling his responsibilities, that appellant would put up a fuss when told to do something, that appellant would not do his chores when he had plans to go out, and that appellant had been accused of sexually molesting the little boy of one of his mother's friends (App.Exh.10, pg. 8-9, 13-14, 17, 31-33).

Trial counsel testified that she talked to David Bolin, but what he had to say did not fit in her theory of mitigation (PCRTr253). She said she investigated him to see whether he was involved in the murders (PCRTr317).

The motion court denied appellant's claim, finding that David Bolin's testimony "would not have been persuasive nor would it have changed the outcome. . . . [he] had been contacted prior to trial by defense counsel and the Court believes the decision was on of sound trial strategy. Additionally, trial counsel was ineffective for failing to call a

witness whose testimony she was suspicious of." (PCRL.F. 907).

The motion court did not plainly err. David Bolin's testimony would have shown that appellant sexually molested a boy, which was evidence trial counsel did not want before the jury (PCRTr262-63), and which would reinforce the other evidence that appellant raped Ms. Brouk and sodomized Mr. Wagner and is a sexual predator. David Bolin's testimony also would show that he provided a good, solid family life for appellant immediately after appellant's primary caregiver died and for the next five-to-six years before appellant committed these crimes. This runs counter to trial counsel's strategy of trying to tell the jury that appellant committed the crimes because he suffered from a poor upbringing. Finally, David Bolin's testimony showed that appellant was generally lazy and did not want to work, which provides additional motive for his decision to rob the Brouks. Therefore, appellant has not rebutted the strong presumption that the decision not to call David Bolin was based on sound trial strategy, and his claim must fail.

D. Joseph Bolin

Joseph Bolin testified that appellant helped him for many years with his pallet business, and appellant did the job well and earned up to $100 each day (App.Exh.11, pg. 9, 12). He said appellant never stole from him, even though he kept large amounts of cash on hand, but that he would have immediately known it if appellant had tried (App.Exh.11, pg. 16-17). He said he once dropped appellant off at a motel room, and

saw appellant's girlfriend there, a woman six years older than him who had a small boy with her in the room (App.Exh.11, pg. 14-15). He said he would have testified for appellant because he was appellant's "best friend" (App.Exh.11, pg. 20).

Trial counsel testified that she talked to Joseph Bolin but did not know why she did not call him (PCRTr255-56).

The motion court denied appellant's claim, finding that the evidence that appellant had been dropped off at a motel room "would not have been persuasive in any way," and that trial counsel interviewed Joseph Bolin before trial "and made a reasonable decision not to call him." (PCRL.F. 927).

The motion court did not plainly err. Joseph Bolin's bias in favor of appellant was obvious; he even called himself appellant's best friend (App.Exh.11, pg. 20). And, if the jury believed his testimony about appellant's older girlfriend, the testimony could have backfired– dropping appellant off at her hotel room implies they were about to have sex, yet her young son was in the room (App.Exh.11, pg. 14-15). This scenario could easily have been taken by the jury as evidence that appellant looked for women with small children for him to prey upon, especially in light of the other evidence of appellant's sexual crimes, and it suggested that appellant's motive for raping Susan Brouk was that he was sexually attracted to older women, but knew he could not have Ms. Brouk because she had kicked him off her property when he tried to introduce himself (Tr965-66).

Joseph Bolin's testimony that appellant had a good source of income in a part-time job also harms appellant's theory that he was treated like a slave on Bolin Hill and had no way out other than to rob Ms. Brouk. Therefore, appellant has not rebutted the strong presumption that trial counsel's decision not to call Joseph Bolin was reasonable trial strategy, and his claim must fail.

E. Kevin Bolin

Kevin Bolin testified that he was 16 years old at the time of the deposition in September 2002 (App.Exh.12, pg. 6), which would have made him thirteen years old at the time of appellant's trial in August 1999, and no more than twelve years old at the time of the crimes in February 1998 (Tr1, 966). He said that appellant was like an older brother, he was always nice, and they used to hunt, fish, and go shopping at WalMart together (App.Exh.12, pg. 7-9).

Trial counsel said she did not talk to Kevin Bolin if he was under twelve years old at the time (PCRTr256). PCR counsel did not ask trial counsel why she made this decision.

The motion court denied appellant's claim, finding that "his testimony would not have altered the outcome at trial" and "offered no significant evidence in mitigation" (PCRL.F. 915).

The motion court did not plainly err. Trial counsel could reasonably conclude that no matter what a twelve or thirteen-year-old had to say, the risk of offending the jury by

putting a child on the stand to defend a rapist and murderer would be too high. Further, his testimony that appellant was a nice brother who did fun things with him is inconsistent with appellant's theory of mitigation that appellant had a poor upbringing which inevitably caused him to commit these crimes. Therefore, appellant did not rebut the strong presumption that trial counsel's actions were reasonable trial strategy, and his claim must fail.

F. Laura Bolin

Laura Bolin testified that she is David Bolin's youngest daughter, and that when appellant first came to live with them, she resented him (App.Exh.13, pg. 6-7). She said she would tattle on appellant, but he would not do anything back to her, and that their relationship improved and they would shoot bottle-rockets at each other and she would talk to him about boyfriends (App.Exh.13, pg. 8-11).

Trial counsel testified she did not call Laura Bolin because her testimony did not fit with her theory of mitigation that appellant had a dysfunctional family background (PCRTr256).

The motion court denied appellant's claim, finding that her testimony "would not have altered the outcome at trial," "offered no significant evidence in mitigation," and that counsel, "did not act unreasonably and movant was not prejudiced." (PCRL.F. 909).

The motion court did not plainly err. Laura Bolin's testimony tended to show that after an initial period of adjustment, appellant had a pleasant family life for several years.

This ran counter to trial counsel's mitigation strategy that appellant had a dysfunctional family life. Therefore, her decision was reasonable trial strategy, and appellant's claim must fail.

G. Anna Christeson

Anna Christeson testified that she lived near appellant's family when they lived in California, that when his parents argued, they sent appellant and his brother to spend the night with them, and that appellant was a normal kid (App.Exh.20, pg. 7-9). She said that appellant was good with the other kids on Bolin Hill (App.Exh.20, pg. 11-12).

Trial counsel testified that her paralegal talked to Anna Christeson, but she did not remember what she said, so did not know why she did not call her (PCRTr258).

The motion court denied this claim, finding that Anna Christeson's testimony "did not provide any information that would not be cumulative to other mitigating evidence that was presented at trial" (PCRL.F. 908).

The motion court did not plainly err. At trial, appellant's mother, brother, and aunt testified about life in California (Tr1610-13, 1623-24, 1638-40), and more evidence of this time would have been cumulative. "Counsel is not ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d 678, 683 (Mo.banc2000). Further, her testimony that appellant was a normal kid on Bolin Hill would contradict trial counsel's strategy of presenting appellant as perpetually depressed over his father's death and burdened with a dysfunctional family. Therefore, appellant has not overcome the

strong presumption that trial counsel's action was based on reasonable trial strategy, and his claim must fail.

H. Dale Christeson

Dale Christeson testified that when appellant lived in California he was "[J]ust a normal kid," and that the times when Dale Christeson visited Bolin Hill, he would "joke around" with appellant (App.Exh.21, pg. 6-9). He said he did "not really" see appellant angry, and never saw him aggressive (App.Exh.21, pg. 8).

Trial counsel testified that her paralegal talked to Dale Christeson, and she thought the reason she did not call him was because he did not fit her theory of mitigation (PCRTr258).

The motion court denied appellant's claim, finding that trial counsel's decision not to call him was reasonable, and that Dale Christeson's testimony was cumulative (PCRL.F. 907-908).

The motion court did not plainly err. Dale Christeson did not see appellant regularly (App.Exh.20, pg. 7-8), so his testimony about appellant's character was lacking probative value. His testimony that appellant was normal in California and would joke around on Bolin Hill did not fit trial counsel's mitigation strategy of telling the jury that appellant was warped by his dysfunctional family life. Therefore, trial counsel's decision not to call him was reasonable trial strategy, and appellant's claim must fail.

I. Jerry Christeson

Jerry Christeson testified that during the time he lived on Bolin Hill, he spent time with appellant and they went to the same school (App.Exh.22, pg. 7-9). He said appellant would get angry, but go somewhere else to cool down, he never saw appellant violent, appellant was like a brother to him, letting him borrow clothes, doing chores together, riding around together, and sticking up for him, and that appellant was happy (App.Exh.22, pg. 9-11).

Trial counsel testified that she was not sure whether her paralegal talked to him, and she could not "think of a reason why [she] didn't" (PCRTr258-59).

The motion court denied appellant's claim, finding that Jerry Christeson's testimony that appellant was a friend and a nice person "would not have changed the outcome of the trial." (PCRL.F. 909).

The motion court did not plainly err. Jerry Christeson's testimony was that appellant's life on Bolin Hill was great and that appellant was happy there. This ran counter to trial counsel's mitigation theory, and it was a reasonable strategic decision not to call him. Further, in light of the horrendous nature of the rape and murders appellant committed, there is no reasonable probability that this testimony would have affected the jury's decision. Therefore, appellant's claim must fail.

J. Kathleen Craig

Ms. Craig testified that she had been incarcerated in federal prison since 1994 for distributing methamphetamine, and had only been released one month before the

deposition (App.Exh.6, pg. 18-20). She testified that when appellant was an infant, his mother neglected him, called him a "bastard," and once put her mouth on his penis, but she never reported that to anyone (App.Exh.6, pg. 10-11, 21-22). She said appellant's father was the primary caregiver in the house, so his death was hard on the family (App.Exh.6, pg. 15-16). She said when appellant was five or six years old Jerry Belcher called him "bitch" and "bastard," had him mow the lawn, and would threaten to "kick his ass" if appellant did not do things (App.Exh.6, pg. 13). She said she did not know appellant to be violent or "really" lose his temper (App.Exh.6, pg. 16).

Trial counsel testified that she talked to Kathleen Craig over the phone, and she had no reason for not offering her testimony (PCRTr254).

The motion court denied appellant's claim, finding that she could not give the jury any information about appellant for the four years before the murders and had no credibility because she was in prison and never reported the allegation of sexual abuse of appellant, so trial counsel's decision not to call her was reasonable (PCRL.F. 913-14).

The motion court did not plainly err. The court's finding that Kathleen Craig had no credibility is supported by the facts that she was an incarcerated drug dealer, and she never reported the alleged sexual abuse to anyone. State v. Kenley, 952 S.W.2d 250, 261-62 (Mo.banc1997) (evidence supported motion court's finding that witness lacked credibility). Her claims that appellant's mother treated him poorly and that his father's death was hard on the family were cumulative to his mother's, brother's, aunt's, and Dr.

Draper's trial testimony, which included evidence that appellant had been beaten and whipped (Tr1607-1616, 1623-32, 1637-44, 1670). "Counsel is not ineffective for not putting on cumulative evidence." Skillicorn v. State, 22 S.W.3d at 683. Her testimony regarding appellant's character was also too remote to be probative. Kates v. State, 79 S.W.3d 922, 928 (Mo.App.S.D.2002). Therefore, the decision not to call her was reasonable trial strategy and not ineffective, and in any event, appellant did not suffer manifest injustice because there is no reasonable probability her testimony would not have affected the jury's decision.

K. Chester Bockover

Chester Bockover testified that he knew appellant from going to the same school he did and from seeing him once a month after that (App.Exh.7, pg. 7-8, 11). He said they were not close friends, did not "hang out" together, and that he only saw him at school, but said appellant was always nice, and never lost his temper or was violent (App.Exh.7, pg. 8-10).

Trial counsel testified that she did "not recall speaking with [Chester Bockover], or his name" (PCRTr254-55).

The motion court denied appellant's claim, finding that Chester Bockover's testimony "would not have been helpful or determinative" (PCRL.F. 910).

The motion court did not plainly err. Trial counsel was not familiar with Chester Bockover's name, and appellant has provided no evidence that he told trial counsel about

the existence of Chester Bockover. Middleton v. State, 103 S.W.3d 726, 740 (Mo.banc2003) (trial counsel not ineffective for failing to call witness where movant did not prove he told trial counsel of the existence of the witness).

Additionally, he has not suffered manifest injustice. Chester Bockover did not know appellant very well, and only saw him at school, so his testimony about appellant's character does not carry much weight, especially considering that in the time period just before the murders, which is the most relevant time period, he only saw appellant once a month. Given the horrible facts of the crimes and the overwhelming evidence that appellant committed these crimes, there is no reasonable probability that, had the jury heard that a classmate had not seen appellant angry or violent, it would have affected the verdict. Therefore, appellant's claim must fail.

L. Debbie Bullock

Debbie Bullock testified that she knew appellant from going to school with him and from living near him on Bolin Hill (App.Exh.16, pg. 6-8). She said that appellant was never violent or angry in school, that he had a very good reputation for truth or veracity, that he would play with the kids on Bolin Hill and help them with their homework, and that appellant never stole money from her boyfriend, Joseph Bolin, even though he often had cash lying around from his pallet business (App.Exh.16, pg. 6-11).

Trial counsel testified that she was unsure whether she talked to Debbie Bullock, and appellant did not ask her why she did not call her (PCRTr257-58).

The motion court denied the claim, finding that: "Her information would not have been persuasive and trial counsel was not ineffective in failing to call this witness" (PCRL.F. 910).

The motion court did not plainly err. Debbie Bullock's testimony showed that appellant was well-adjusted on Bolin Hill and had a good life there, which ran counter to trial counsel's strategy to portray appellant as having a dysfunctional family background which finally culminated in his committing the rape and murders. There is no reasonable probability that her testimony that appellant had a good reputation for truthfulness and was not violent or angry would have changed the outcome of trial; the overwhelming evidence that appellant committed these crimes and his cross-examination showed that appellant lied on the stand, and that he was extremely violent in carrying out the rape and murders. Therefore, appellant's claim must fail.

M. Melissa Keeney

Melissa Keeney testified that she taught appellant in the small engines class his senior year of high school, that he must have passed the safety test because he was allowed in the shop, and that she did not remember him having any behavior problems except for being absent several times (App.Exh.26, pg. 6-10).

Trial counsel testified that she did not know why she did not call Melissa Keeney (PCRTr261).

The motion court denied this claim, finding that her testimony would not have

provided appellant with a viable defense (PCRL.F. 912).

The motion court did not plainly err. In light of the overwhelming evidence of the horrible way in which appellant robbed, raped, and murdered, there is no reasonable probability that testimony from his teacher that he was often missing from the classroom, but when he was there did not cause trouble, would have changed the outcome of trial. Therefore appellant's claim has no merit, and must fail.

POINT VII

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel for not presenting a variety of additional documents and allegations through the testimony of Dr. Wanda Draper because appellant has not rebutted the strong presumption that trial counsel's decision was based on reasonable trial strategy in that Dr. Draper testified that trial counsel told her to stop her investigation, and the motion court found that trial counsel's assertion that she had no reason for taking this action was not credible.

In any event, appellant has not suffered Strickland prejudice, in that the evidence had marginal relevance, was cumulative, or tended to show appellant was a sexual predator.

For his seventh point on appeal, appellant claims the motion court clearly erred in denying his claim that his attorneys should have presented more documents and allegations through Dr. Draper in penalty phase (App.Br. 93).

1. Standard of review

"[T]he selection of witnesses and evidence are matters of trial strategy, virtually unchallengeable in an ineffective assistance claim." Clayton v. State, 63 S.W.3d 201, 208 (Mo.banc2001); Strickland v. Washington, 466 U.S. 668, 690 (1984). "Reasonable trial strategy is not ineffective assistance of counsel because it did not work as hoped.

Neither is it ineffective for counsel to pursue one reasonable trial strategy to the exclusion of another, even if the latter is also reasonable." State v. Knese, 85 S.W.3d 628, 633 (Mo.banc2002). "There is no absolute duty to present mitigating character evidence." Rousan v. State, 48 S.W.3d 576, 583 (Mo.banc2001).

2. Appellant has not rebutted the strong presumption that the decision not to delve further into appellant's background was based on reasonable trial strategy

Dr. Wanda Draper testified that she had talked with trial counsel Valerie Leftwich about making a life path chart for appellant's trial, and that Ms. Leftwich knew she was making the chart (PCRTr104). When Dr. Draper had partially completed the chart, Ms. Leftwich called her and told her to stop making the chart because she had "decided not to go that direction" (PCRTr98, 104-105).

Trial counsel claimed she had no reason for not having Dr. Draper prepare a life-path for appellant, and testified that: "If I didn't ask her[Dr. Draper] at all about anything that would have an effect on [appellant's] development, then I have no reason for that" (PCRTr277). She claimed she had no reason for not introducing additional documents about appellant's life and his parent's mental conditions (PCRTr264-69).

The motion court denied all these claims, finding that trial counsel's claims that she did not have a reason for her actions were not credible and that she appeared to still be advocating for appellant by claiming to be ineffective, that she could reasonably decide that presenting more material to the jury in an attempt to seek sympathy could

"'backfire in light of the nature of this crime," and that Dr. Draper "was not particularly credible or persuasive at the first trial," her attempts to draw significance from typical childhood events were "not very credible," and her "attempts to develop sympathy" from appellant's father's death could have been counter-productive in light of the fact that appellant killed a mother and two children (PCRL.F. 918-25, 927-28).

The motion court did not clearly err. The motion court found that trial counsel's automatic assertions that she had no reason for any of these decisions, even when she had specifically discussed certain decisions with Dr. Draper, were not credible. State v. Twenter, 818 S.W.2d 628, 635 (Mo. banc1991) (reviewing court gives deference to motion court's findings on credibility). Perhaps trial counsel decided to stop investigating appellant's background when she discovered he had sexually molested a boy, and was worried further investigation would uncover even more damaging evidence which would have to be disclosed to the prosecutor– she testified she did not want to present that evidence to the jury (PCRTr262-63), and she showed by her answer on another issue that she was careful not to uncover information that could be damaging to her case— she chose not to ask Mr. Gibbs whether appellant had confessed to him (PCRTr271). Perhaps trial counsel determined that she had enough of the type of evidence she wanted to present about appellant's life, and was concerned that presenting more would do nothing but irritate the jury. State v. Tokar, 918 S.W.2d 753, 768 (Mo.banc1996) (reasonable strategy to forgo option for fear of irritating jury).

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689. In light of the motion court's finding that trial counsel's denials were not credible, appellant has failed to overcome the strong presumption that trial counsel's actions were based on reasonable trial strategy, and his claim must fail.

3. The additional evidence was inadmissible hearsay, and, in any event, the evidence had marginal relevance, lacked credibility, was cumulative, or tended to show appellant was a sexual predator

Dr. Draper's repetition of various hearsay statements was not admissible, because they did not go to explain any "expert" opinion. State v. Brown, 998 S.W.2d 531, 549 (Mo.banc1999) (expert may rely on hearsay to make findings even if that evidence is not independently admissible, but where evidence was merely reciting other's statements, and not basis for opinion, evidence was properly excluded). Trial counsel could not have been ineffective for failing to offer inadmissible evidence. State v. Chambers, 891 S.W.2d 93, 110 (Mo.banc1994).

In any event, evidence of appellant's alleged biological father's mental issues was irrelevant– even Dr. Draper testified that there was no evidence appellant was also schizophrenic, and his alleged biological father's condition had no significance in

determining appellant's responsibility for the crimes (PCRTr112). Evidence of appellant's mother's mental issues was cumulative to trial evidence that she is manic-depressive and had been placed in a mental institution when she was eighteen (Tr1611-12), evidence that she had learning disabilities and might need a guardian had marginal relevance because she was not the primary caregiver for her children (Tr1623). Evidence that appellant had been sexually abused lacked credibility because it came solely from appellant himself for one incident, solely from appellant's incarcerated drug-dealing cousin who never reported the abuse to anyone for another incident, and solely from an unknown relative for a third incident (PCRTr72, 107-109, App.Exh.6, pg.5, 18-22). Evidence that when he lived on Bolin Hill, it was a community of extended family who lived in several trailers and kept some livestock in pens had marginal relevance, especially to any jury drawn from mid-Missouri, where trailer parks and farming are common (as any drive on this state's secondary highways will prove). Also, Dr. Draper testified that the way the extended family pulled-together and supported each other was "very positive," and the negative aspect was it made appellant greedy for material things his friends had (PCRTr95-96). This testimony ran counter to trial counsel's theory that appellant's life on Bolin Hill was dysfunctional, and supported the state's theory that one of appellant's motives to commit the crimes was to steal Ms. Brouk's car and other property. Therefore, there is no reasonable probability that, had trial counsel presented this evidence, the jury's decision would have been different.

Appellant relies on Williams v. Taylor, 529 U.S. 362, 395-98, 120 S.Ct. 1495, 1514-15 (2000), for the proposition that "even though counsel had presented a substantial mitigation case," he "was ineffective" for not presenting "other available mitigation evidence" (App.Br. 98). However, in Williams, trial counsel did not begin preparing for penalty phase until the week before trial, did no investigation into appellant's horrific background, and his only penalty phase evidence was witnesses who only said appellant was a "nice boy" and not a violent person, and a psychiatrist who said that appellant took the bullets out of the gun in an earlier robbery. Id., 529 U.S. at 369, 395-96, 120 S.Ct. at 1500, 1514-15. In contrast, in the case at bar, trial counsel did investigate appellant's background and made a trial strategy decision not to present all of the evidence, and there is no reasonable probability that, had the additional evidence been presented, the result of the proceeding would have been different. Therefore, Williams is distinguishable.

Appellant also relies on Wiggins v. Smith, 123 S.Ct. 2527 (2003), but that case is similarly distinguishable for trial counsel's lack of investigation and failure to present any mitigation evidence other than his lack of prior convictions. In contrast, in the case at bar, trial counsel investigated appellant's background and made a reasonable strategic decision to present a focused mitigation theory of appellant's dysfunctional upbringing and not presenting irrelevant evidence which lacked credibility and risked offending the jury. Therefore, appellant's reliance on Wiggins is misplaced, and his point must fail.

POINT VIII

The motion court did not err in denying appellant's motion to disqualify him because Judge Darold was qualified to sit as a special judge under the plain terms of § 476.681 in that he was a retired judge.

In his eighth point, appellant claims that Judge Darnold was not qualified to hear his postconviction motion, because he had been defeated in an election (App.Br. 102).

1. Facts

Judge Darnold presided over appellant's trial held in 1999 (Tr1). In the 2000 election for judge of the twenty-eighth circuit, he lost to James R. Bickel. Official Manual State of Missouri 2001-2002, page 648. Judge Darnold retired at the end of his term of office (DQTr16).

On November 16, 2001, this Court asked Judge Darnold to preside, as a senior judge, over appellant's postconviction proceedings (PCRL.F. 1, 10, DQTr6-7). Appellant filed a motion to disqualify Judge Darnold, and a hearing on the motion was held on April 10, 2002 (PCRL.F. 1-2, DQTr2). Judge Darnold denied the motion to disqualify him, and appellant filed a writ to this Court (PCRL.F. 3, PCRTr4). This Court denied the writ, and the next month Judge Darnold presided over appellant's postconviction hearing, and later proceedings (PCRTr4, PCRL.F. 3).[4]

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[4] Respondent believes the case involving the writ was Christeson v. Darnold, No.

2. Standard of review and law on disqualification of judges

Review is for clear error. State v. Simmons, 955 S.W.2d 729, 745 (Mo.banc1997).

The general rule is that a judge who presided over the trial of a case may also preside over later proceedings of that case– the mere fact that the judge is familiar with the facts of the case or has said that the defendant is reprehensible does not establish a disqualifying bias. Haynes v. State, 937 S.W.2d 199, 202-203 (Mo.banc1996); State v. Ferguson, 20 S.W.3d 485, 509-510 (Mo.banc2000); Liteky v. U.S., 510 U.S. 540, 550-51, 114 S.Ct. 1147, 1155 (1994).

Further, "[e]ffective administration of justice prefers that the trial judge oversee the Rule 29.15 hearing." State v. Whitfield, 939 S.W.2d 361, 368 (Mo. banc1997). The judge who saw the trial witnesses testify and was privy to conversations with counsel during trial can better assess the impact of trial counsel's actions on the case and judge the credibility of witnesses during the postconviction proceedings.

3. The motion court did not err in denying appellant's motion to disqualify him

When a trial judge retires, this Court may assign the judge to preside over the postconviction case as a senior judge. Mo.Const.Art. V, § 26; § 476.681. This constitution and statute do not require the judge to have been undefeated in any election.

Rather, by their plain terms, the constitution only requires that the judge be "retired," and the statute only requires that the judge be retired, and be physically and mentally healthy. Mo.Const.Art. V, § 26.3, § 476.681.1, RSMo 2000.

Appellant does not contest the fact that Judge Darnold was retired, and that he was in good physical and mental health. Therefore, under the plain terms of Mo.Const.Art. V, § 26, § 476.681, Judge Darnold was qualified to serve as special judge overseeing appellant's postconviction proceedings.

Appellant argues that Judge Darnold was defeated in a contested election, and that the constitution and statute should be construed to mean that losing an election prevents a judge from being appointed a senior judge, arguing that even if a judge is retired, that judge is not retired under the constitution and statute if the judge previously lost a reelection bid (App.Br. 104). However, rules of construction only apply when the law is unclear or there is more than one possible interpretation. State v. Rowe, 63 S.W.3d 647, 649 (Mo.banc2002). "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." Id. The statute and constitution make no differentiation between how a judge came to be retired, whether through personal choice, being forced to retire at a certain age, or through losing an election, but only requires that the judge be a retired judge in order to be qualified to be appointed a senior judge. Mo.Const.Art. V, § 26, § 476.681. For this reason, appellant's reliance on Nguyen v. United States, 123 S.Ct. 2130 (2003), is misplaced; in that case the judge had no

authority to serve.

Appellant also argues that the people must not have wanted Judge Darnold to ever serve on any case ever again, not even as a senior judge, when they voted for his opponent (App.Br. 105). Appellant's argument is highly speculative, and worse, ignores the fact that the people spoke through the plain terms of the constitution and laws they passed. If the people do not want a judge who had been defeated in an election to be able to be appointed a special judge, they can pass a constitutional amendment or statute which says so. Instead, the people passed a constitutional amendment and statute which allows any retired judge, no matter how the judge came to be retired, to serve as a special judge. Appellant's argument does not give effect to the will of the people, but tramples the will of the people expressed in the plain terms of the constitution and statute. For this reason his reliance on Ederer v. Dalton, 618 S.W.2d 644 (Mo.banc1981) is misplaced; in that case, a tax was rejected but a district tried to impose it anyway, but in appellant's situation, Judge Darnold served under a statute that specifically allowed him to serve.

Therefore, appellant's argument has no merit, and his point must fail.

POINT IX

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on the ground that trial counsel did not object when the prosecutor said, in the penalty phase closing argument, that appellant had not acknowledged responsibility for his crimes, because this did not violate appellant's right not to testify in that the prosecutor was referring to his guilt-phase testimony where he took the stand and denied participating in the crimes.

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on the ground that trial counsel did not object when the prosecutor used an example from the Bible in guilt phase closing argument because this did not constitute excessive religious references in that it was an isolated reference properly used to explain the concept that different accounts of an event might have inconsistent details while still being correct overall.

For his ninth point on appeal, appellant claims that the motion court clearly erred in denying two claims regarding the prosecutor's closing arguments (App.Br. 107).

1. Standard of review

Appellant's point does not explain wherein and why appellate counsel's decision is grounds for reversal. Rather, he lumps two disparate claims of error into one point,

and makes a conclusory assertion that reasonable trial counsel would have objected (App.Br. 107). This does not comply with Supreme Court Rules 30.06(c) and 84.04(d). State v. Cella, 32 S.W.3d 114, 119 (Mo.banc2000); Thummel v. King, 570 S.W.2d 679, 686 (Mo.banc1978); Mello v. Williams, 73 S.W.3d 681, 685 (Mo.App.E.D.2002). His lumping of numerous claims into one point also violates these rules. State v. Thompson, 985 S.W.2d 779, 784, note 1 (Mo.banc1999). Therefore, his point is not preserved, and is reviewable, if at all, for plain error only. "Under the plain error rule, 'Appellant must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.'" State v. Worthington, 8 S.W.3d 83, 87 (Mo. banc1999).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was unreasonable, and that such unreasonable performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689.

2. Each of appellant's claims is without merit

A. Penalty argument reference to appellant's lying on the stand in guilt phase

In the guilt phase of trial, appellant took the stand and testified that he did not commit the crimes (Tr1403-1420). In appellant's penalty phase closing argument,

appellant's trial counsel did not acknowledge appellant's guilt, but rather said appellant was "not just the person you found was at that pond that day, that you found was at Susan Brouk's house that day" (Tr1717). In the rebuttal portion of penalty phase argument, the prosecutor argued "this man maintains the lie that he told you from the witness stand. To this moment, he does not acknowledge responsibility for these acts. He maintains the lie." (Tr1722).

Trial counsel testified she "had no reason" for not objecting to this argument (PCRTr375).

The motion court denied this claim, stating: "This Court expressly finds that the witness was not credible when she repeatedly stated that she doesn't have a reason . . . It appears that Ms. Leftwich continues to be an advocate for movant by claiming to be ineffective." (PCRL.F. 890-91). The motion court also found that the argument was permissible, because the prosecutor "was asserting that the jury should consider movant's lack of remorse for his crimes," and that "in light of the overwhelming evidence" of his guilt, appellant had not shown prejudice (PCRL.F. 891).

The motion court did not plainly err. Because the motion court found not credible trial counsel's claim to have no reason for not objecting, appellant has not overcome the strong presumption that trial counsel's actions were based on reasonable trial strategy, such as not highlighting the argument to the jury. Strickland v. Washington, 466 U.S. at 689; State v. Tokar, 918 S.W.2d 753, 768 (Mo.banc1996) ("It is feared that frequent

objections irritate the jury and highlight the statements complained of, resulting in more harm than good.").

Further, the argument did not violate appellant's right not to testify, but referred to the fact that appellant lied on the stand in guilt phase, and came immediately after his trial attorney's argument where she decided to maintain the claim of innocence by her phraseology "you found" instead of simply stating what he did (Tr1717). The prosecutor's argument was not a reference to appellant's decision not to testify in penalty phase, but was a reference to appellant's testimony in guilt phase and his trial attorney's argument. *See* State v. Coleman, 949 S.W.2d 137, 144-45 (Mo.App.W.D.1997), *overruled on other grounds by* State v. Couts, No.WD61714, *which case has been transferred to this Court*. Further, the argument was brief, and did not cause appellant manifest injustice. State v. Neff, 978 S.W.2d 341, 344-45 (Mo.banc1998). Therefore, the motion court did not plainly err in denying appellant's claim of ineffective assistance of counsel for not objecting, and appellant's claim must fail.

B. Isolated biblical reference

In the rebuttal portion of guilt phase closing argument, the prosecutor argued that although the Biblical accounts vary slightly as to what the signs on the cross said, that discrepancy did not mean the crucifixion did not occur, and similarly the discrepancies in the details of Jesse Carter's statements did not change the fact that he and appellant murdered the Brouks (Tr1498-99). Trial counsel objected at the start of the argument and

asked to approach, but the objection was overruled, and then raised a more specific objection, which was also overruled (Tr1498-99).

At the motion hearing, trial counsel testified he did not remember why he did not make the objection postconviction counsel said he should have made (PCRTr205-206).

The motion court denied the claim, finding that trial counsel's actions were reasonable, and appellant was not prejudiced (PCRL.F. 871).

The motion court did not plainly err. Trial counsel's testimony that he did not remember why he did not make more extensive objections does not overcome the strong presumption that his actions were based on reasonable trial strategy, for example, not wishing to highlight the argument for the jury. Clark v. State, 93 S.W.3d 455, 460 (Mo.App.S.D.2003); Fretwell v. Norris, 133 F.3d 621, 627-28 (8th Cir. 1998) (using counsel's inability to recall his reasons for his actions as evidence of ineffective assistance violates Strickland's presumption that an attorney performed reasonably); State v. Tokar, 918 S.W.2d at 768. Further, on direct appeal, this Court addressed the propriety of this same biblical reference, and held: "The biblical references highlighted the fact that different accounts of an event may vary in the details while remaining consistent overall, and they were not improper for that limited purpose." State v. Christeson, 50 S.W.3d 251, 269 (Mo.banc2001). Because the reference was not improper, trial counsel could not have been ineffective for not making more objections to it. State v. Clay, 975 S.W.2d 121, 135 (Mo.banc1998) ("Counsel will not be deemed

ineffective for failing to make non-meritorious objections"). And, appellant could not have suffered manifest injustice from trial counsel's decision not to make more objections to a permissible argument. Therefore, his claim must fail.

POINT X

The motion court did not plainly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds of trial counsel's actions in regards to many instructions.

For his tenth point on appeal, appellant claims that the motion court clearly erred in denying his claims regarding trial counsel's handling of the instructions (App.Br. 112).

1. Standard of review

Appellant's point does not explain wherein and why appellate counsel's decision is grounds for reversal. Rather, he lumps at least four distinct claims of instructional error into one point and makes a conclusory assertion that reasonable appellate counsel would have "ensured the jury was properly instructed" (App.Br. 112). This does not comply with Supreme Court Rules 30.06(c) and 84.04(d). State v. Cella, 32 S.W.3d 114, 119 (Mo.banc2000); Thummel v. King, 570 S.W.2d 679, 686 (Mo.banc1978); Mello v. Williams, 73 S.W.3d 681, 685 (Mo.App.E.D.2002). His lumping of numerous claims into one point also violates these rules. State v. Thompson, 985 S.W.2d 779, 784, note 1 (Mo.banc1999). Therefore, his point is not preserved, and is reviewable, if at all, for plain error only. "Under the plain error rule, 'Appellant must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.'" State v. Worthington, 8 S.W.3d 83, 87 (Mo. banc1999).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must

show that trial counsel's performance was unreasonable, and that such unreasonable performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689.

2. Each of appellant's claims is without merit

A. No-adverse inference instruction

Appellant first claims that his trial counsel was ineffective for not requesting the optional no-adverse inference instruction during penalty phase (App.Br. 113).

At the evidentiary hearing on appellant's motion, trial counsel testified that she "had no reason" for not requesting the instruction and that she "didn't consider" the possibility of requesting it, even though she knew the court would give it if she asked (PCRTr351).

The motion court denied this claim, finding that the decision not to request the instruction was based on reasonable trial strategy (PCRL.F. 936-37), a finding that shows the motion court did not find trial counsel's testimony credible.

The motion court did not plainly err. Although the no-adverse inference instruction must be given upon the defendant's request, *see* MAI-CR 3d 308.14, Notes on Use 2, the instruction is a two-edged sword, telling the jury they cannot draw an adverse

inference from the defendant's decision not to testify, and at the same time necessarily highlighting that fact to the jury. Reasonable trial counsel may decide to forego the instruction, believing that it highlights the fact that the defendant did not testify. Knese v. State, 85 S.W.3d 628, 635 (Mo.banc2002); Ellis v. State, 773 S.W.2d 194, 199 (Mo.App.S.D.1989). Such a decision does not constitute ineffective assistance of counsel. Knese v. State, 85 S.W.3d at 635; Love v. State, 670 S.W.2d 499, 502 (Mo.banc1984) ("An objectively reasonable choice not to submit an available instruction does not constitute ineffective assistance of counsel."). Thus, the motion court did not plainly err in finding that trial counsel acted reasonably in not requesting the instruction, and appellant's claim must fail.

B. MAI-CR 3d 313.46A

Appellant next complains about the giving of MAI-CR 3d 313.46A (App.Br. 116). Instruction 30, patterned on MAI-CR 3d 313.46A, read as follows:

> As to Counts I, II and III, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

(App.Exh.4D, pg. 543).

MAI-CR 3d 313.00, Notes on Use 5(2)(c) required the instruction to be repeated for each count, but instead the instruction was given at the end of the three counts, and expressly referenced each of the three counts.

Trial counsel testified that she was not aware that the instruction was required in each series instead of at the end, and she had "no reason" for not objecting to it (PCRTr347-49).

The motion court denied the claim, finding that appellant was not prejudiced (PCRL.F. 934-35).

The motion court did not plainly err. "To find plain error, the trial court must have 'so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice.'" State v. Black, 50 S.W.3d 778, 788 (Mo.banc2001); State v. Westfall, 75 S.W.3d 278, 280 (Mo.banc2002). Unless the jurors were unconscious during the entire trial, they could not have missed the fact that they never had to impose the death penalty. They heard it from the court (and sometimes counsel) in voir dire, trial counsel hammered that fact in penalty phase closing argument, the court read them the instruction which said it, and the instruction specifically said that for all three counts, the jury never had to impose death (Tr51, 90, 142, 183, 242, 296, 342, 438, 562, 610, 1697-98, App.Exh.4D, pg. 543). Because the jury was not misled by the error, there was no reasonable probability that had trial counsel objected, the result of the proceeding would have been any different. Therefore, the motion court did not plainly err, and appellant's

claim must fail.

C. The instructions required the jury to find that appellant deliberated

Appellant's next claim is that trial counsel was ineffective for failing to object to Instructions 6-7, 9-10, and 12-13 (App.Br. 117).

Instructions 6, 9, and 12 required the jury to find that appellant or Jesse Carter deliberately murdered each of the Brouks, and then required the jury to make an additional finding that:

> Fourth, that with the purpose of promoting or furthering the death of Susan Brouk [and Adrian and Kyle in the other instructions], **the defendant** acted together with, aided or encouraged Jessie Carter in causing the death of Susan Brouk [and Adrian and Kyle in the other instructions], **and did so after deliberation**, which means cool reflection upon the matter for any length of time no matter how brief

(App.Exh.4D, pg. 507, 512, 517, emphasis added). The converse instruction required them to find appellant not guilty if either he or Jesse Carter did not deliberate (App.Exh.4d, pg. 508, 513, 518).

Trial counsel testified she "had no reason" for not objecting to the instructions, and she "certainly should have," and she just based the converse instructions they submitted on the state's verdict directors (PCRTr354-56).

The motion court denied this claim, finding: "The verdict directors were proper

and not prejudicial" (PCRL.F. 932).

The motion court did not plainly err. Contrary to appellant's assertion, the fourth element of each verdict director plainly required the jury to find, beyond a reasonable doubt, that appellant himself deliberated upon the murders in order to find him guilty. The converse instructions required the jury to acquit appellant if either he or Jesse Carter did not deliberate, and thus if they found appellant did not deliberate, they had to acquit him under the instruction. Accordingly, the jury was not misdirected, and appellant's claim must fail.

D. Proper aggravating circumstance

Appellant's fourth claim regards the instructions on aggravating circumstances for Susan Brouk (App.Br. 118).

Instruction 21 set out four aggravating circumstances for the murder of Ms. Brouk: the two other homicides, the defendant's raping her, and depravity of mind (App.Exh.4D, pg. 531).

Trial counsel testified she had "no reason" for not objecting to the instruction (PCRTr357-58).

The motion court denied the claim, finding that the instruction was proper, and appellant was not prejudiced because the instruction required the jury to find that he killed Ms. Brouk after she was bound, and it did not matter who bound her (PCRL.F. 932-33).

The motion court did not plainly err. Appellant quotes part of the depravity aggravator instruction out of context, and then claims the use of "or" allowed the jury to find that appellant acted with depravity even if he did nothing (App.Br. 118-19). The entire depravity aggravator read:

> 3. Whether the murder of Susan Brouk involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant **and** the other person killed Susan Brouk after she was bound or otherwise rendered helpless by the defendant or the other person; **and that defendant thereby exhibited** a callous disregard for the sanctity of all human life

(App.Exh.4D, pg. 531, emphasis added). Thus, the entire instruction required the jury to find that appellant himself killed Susan Brouk after she was bound by someone, and that appellant himself exhibited a callous disregard for the sanctity of human life by this action. Accordingly, appellant's claim that the aggravating circumstance was improper is without merit, and trial counsel was not ineffective for not objecting to it. State v. Clay, 975 S.W.2d 121, 135 (Mo.banc1998) ("Counsel will not be deemed ineffective for failing to make non-meritorious objections").

Further, the jury found all four aggravating circumstances for the murder of Ms. Brouk (App.Exh.4D, pg. 557). After the jury found one aggravating circumstance, it no

longer considered individual circumstances, but rather considered all the evidence as a whole. State v. Tokar, 918S.W.2d753, 771 (Mo. banc1995); State v. Shaw, 636S.W.2d667, 675 (Mo.banc1982). Thus, as long as any of the three aggravating circumstances were valid, it does not matter whether another one was invalid. Appellant does not challenge the validity of the other aggravating circumstances. Therefore, appellant could not have been prejudiced by trial counsel's actions, and the motion court did not plainly err in denying his claim.

POINT XI

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds of trial counsel's not striking venireperson Conner because appellant has not overcome the strong presumption that trial counsel had a reasonable trial strategy reason for not striking him in that trial counsel testified that she must have had a reason for not doing so.

In any event, appellant has not shown Strickland prejudice, in that venireperson Conner never agreed with venireperson Cole's statement about automatically imposing death, and Conner said he would require proof beyond any doubt both to convict and to impose the death penalty.

For his eleventh point on appeal, appellant claims the motion court clearly erred in denying his claim that trial counsel was ineffective for not moving to strike Juror Conner (App.Br. 120).

1. Facts

During appellant's voir dire, trial counsel Leftwich asked whether anyone would automatically impose the death penalty if they found appellant guilty of three murders (Tr98). Leftwich asked venireperson Conner if he was thinking about that, and he shook his head no (Tr98). Leftwich asked venireperson Cole what he thought, and he said:

Cole: Are you saying, do I think an eye for an eye?

Leftwich: Certainly, yes, that's one question I'm asking you.

Cole: Yeah, basically, I'd say that fits, fits okay. . . .

Leftwich: . . . what did you mean by saying an eye for an eye?

Cole: Well, I'm just saying that if— if the law calls for the death penalty to be invoked, I would be for it. I'm not saying that— You know, you people have got to prove to us both sides, yea or nay. . . . Yes, I think murder justifies the death penalty. But if you take the other side, say, well, yeah, he had a bad childhood or whatever and all this, you know, does that still not make him responsible?

(Tr99, 101, 103). Cole also said appellant would "have to come up with something pretty good" because he thought everyone was responsible for their actions (Tr104). Leftwich then asked whether, if the state proved an aggravator, would Cole require appellant to prove the death penalty was not appropriate, and he answered, "Basically, yeah." (Tr103-104). Leftwich moved on to Conner, and said asked:

Leftwich: . . . Were you in agreement with some of the things that he wassaying?

Conner: Yeah.

Leftwich: What is that?

Conner: The part there where he was talking about being responsible for your own actions. . . . Because if they did it, I'm just saying whatever. If

they did it once, they can do it again, and so, I mean, it doesn't matter if they are sick or not, because to me they're not going to get better.

(Tr105-106). Leftwich asked whether he understood that they would never get to the penalty phase unless they had already found him guilty, and Conner answered:

Conner: Yeah, I'd have to be convinced.

Leftwich: You would have to be convinced of what?

Conner: That he did it. I would have to hear it all, you know, for sure that he is— you know, there's no doubt in my mind that he did it.

Leftwich: Okay, to assess the death penalty or to find him guilty? What are you saying?

Conner: To do either one.

(Tr106-107).

At the hearing on appellant's postconviction motion, one of appellant's trial counsel testified he could not remember any discussion they had on whether to strike Conner (PCRTr128), and trial counsel Leftwich testified that she could not remember why she did not strike Conner, but said "there must have been some reason why I didn't move to strike him" (PCRTr276). At other times she testified that she had no reason for not striking him and that she might have just missed him (PCRTr244, 319).

The motion court denied the claim, finding that trial counsel's statement that she

had no reason not to strike Conner was not credible, and that such a motion would have been denied because Conner indicated that he would not always impose the death penalty, but rather would require that there be no doubt before he would do so (PCRL.F. 800).

2. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003). "Reasonable choices of trial strategy, no matter how ill fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance." Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc2001); Strickland v. Washington, 466 U.S. 668, 689 (1984).

3. Trial counsel was not ineffective for deciding not to strike Conner because he never said he would always vote for death and did say that he would require "no doubt" to both find appellant guilty and to impose death

As shown above, when Conner said he agreed with some of Cole's responses, he explained that what he agreed with was "being responsible for your own actions" (Tr105). Conner never said he agreed with Cole's statement about automatically imposing death. Therefore, had trial counsel challenged him for cause on grounds that he would always impose death, that motion would have been meritless. State v. Clay, 975S.W.2d121, 135 (Mo.banc1998) ("Counsel will not be deemed ineffective for failing

to make non-meritorious objections").

Further, appellant has not overcome the strong presumption that the decision was reasonable trial strategy. Strickland v. Washington, 466 U.S. at 689. Conner was an excellent juror for the defense. Appellant did not mount a defense claiming he did it but was not responsible, rather, his defense was that he did not commit the crimes at all (Tr1413). Therefore, Conner's statement about responsibility did not go against appellant's theory of the case, and could not have prejudiced appellant. *See* State v. Stanley, No.SD25598, 2004 WL 78197, pg. 7 (January 20, 2004) (where defendant did testify, juror's bias if he did not take stand could not cause manifest injustice). Further, Conner's statements that he would require "no doubt" in order to convict or impose death were completely beneficial to appellant, because they showed he would hold the state to a higher burden of proof than proof beyond a reasonable doubt. Therefore, the motion court did not clearly err in denying appellant's claim, and his point must fail.

POINT XII

The motion court did not clearly err in denying appellant's motion for postconviction relief because generally the state is allowed to take inconsistent positions in the trials of co-conspirators. In any event, the prosecutor did not present an inconsistent theory at appellant's trial because there had been no other trial. Further, the prosecutor's question to Jesse Carter at his trial did not constitute the presentation of an inconsistent theory in that the state's theory, as shown in the state's closing argument, remained that appellant led Carter into committing these crimes and that Carter aided appellant in committing the acts to murder the Brouks, and that appellant was the one who cut the Brouk's throats.

For his twelfth point on appeal, appellant claims the motion court erred in denying his claim regarding the presentation of inconsistent theories at his trial (App.Br. 123).

1. Facts

During appellant's trial, which began on August 30, 1998, Carter testified that Kyle's neck was cut during the time Carter was away from the pond getting a cinder block (Tr989-90).

At Carter's trial, which began on September 18, 2000, during opening statements, the prosecutor stated that Carter was guilty of all three murders because he acted with appellant to cause their deaths (App.Exh.34B, pg. 187-88). The prosecutor also said, in opening statements, that Carter went to get a cinder block, and "[w]hen he returned, Mark

Christeson had already sliced Kyle Brouk's throat." (App.Exh.34B, pg. 192-93).

The prosecutor presented testimony from Sgt. Ralph Roark, who interviewed appellant just after he was arrested (App.Exh.34C, pg. 371). Sgt. Roark testified that appellant told him that Mr. Christeson had cut Kyle's throat (App.Exh.34C, pg. 392). In appellant's taped statement to Sgt. Roark, appellant also said that Mr. Christeson had cut Kyle's throat (App.Exh.34C, pg. 424). The prosecutor offered the transcript of the taped statement into evidence and had it read to the jury (App.Exh.34C, pg. 436-37). The prosecutor also offered the transcript of appellant's testimony in Mr. Christeson's case into evidence, and had it read to the jury (App.Exh.34C, pg. 437-38).

During his own case, appellant took the stand, and on direct examination testified that Mr. Christeson had ordered him to cut Kyle's neck, but appellant had refused, and offered to get a cinder block to weigh down the body instead (App.Exh.34C, pg. 472). Appellant also said that had carried a "dull" pocket knife, and that Mr. Christeson had carried a "bone-cut" knife (App.Exh.34C, pg. 462, 471).

On cross-examination, the prosecutor asked appellant about the knife he carried, and about the knife that Mr. Christeson had carried (App.Exh.34C, pg. 501). Appellant said that his own knife had a dull blade about two or three inches long, and that Mr. Christeson had a buck knife with a bone handle and a blade about four to six inches long (App.Exh.34C, pg. 501). Then the prosecutor questioned Carter about the cuts to Kyle's neck as compared to the cuts to his mother's neck:

Q. Um-hum. In fact, they were smaller because they were inflicted by a smaller knife, weren't they?

A. No, not really.

Q. In fact, they were smaller because they were inflicted by your knife, weren't they?

A. No.

(App.Exh.34C, pg. 505). At that point, appellant's counsel moved for a mistrial on grounds that the prosecutor was changing his theory of the case from the prior trial, and the trial court denied the request (App.Exh.34C, pg. 505).

The prosecutor did not make any references to appellant's knife during the rest of the trial. The prosecutor did not reference appellant's knife at all in closing argument. Instead, the prosecutor argued that appellant "went and got a concrete block, and came back to find Kyle's throat cut" (App.Exh.34D, pg. 656). The prosecutor continued:

> It doesn't matter whether he picked up– or helped hold Kyle Brouk's feet under. When he knew that the purpose was to kill them, and he took them at gunpoint, tied up, and placed them in that vehicle, and they drove them around to the place where he got them out, knowing they'd have to get rid of them, he knew. And he had all the time in the world to think about it, and he went forward anyway. . . .
>
> Did he aid and encourage? Of course he did. He held them at gunpoint.

(App.Exh.34D, pg. 656-57).

The motion court denied appellant's claim regarding inconsistent theories, finding that appellant could not be prejudiced by something that happened at Carter's trial months later, and that if any prejudice had occurred, it would have to have been to Carter (PCRL.F. 926).

2. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court were clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

3. Because appellant's trial was first, it had nothing with which to be inconsistent

"[T]he State is not collaterally estopped from taking inconsistent positions" in the trials of co-conspirators. State v. Nunley, 923S.W.2d911, 926 (Mo.banc1996); State v. Lundy, 829S.W.2d54, 55-56 (Mo.App. S.D. 1992) *and cases cited therein*, State v. Fondren, 810S.W.2d685, 689 (Mo.App. E.D. 1991).

If new evidence is brought to light between trials, whether from scientific tests, new investigation, or information from witnesses, the state may introduce that evidence and argue the inferences from it, even if doing so is inconsistent with what was done in a previous trial. State v. Couch, 111S.W.2d147, 150 (Mo. 1937) (after person pled guilty to shooting, police discovered physical evidence and witness information showing Couch was the real shooter; state was not barred from trying Couch for the murder, even though it was inconsistent with the proceedings in the other person's conviction).

Also, evidence in a subsequent proceeding may be different from the evidence in a previous proceeding, even if the evidence is all generally known before either proceeding begins. *See* Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000) (passage of four months' time between trials "may be a legitimate excuse for minor variations in testimony or defects in memory"); State v. Hunter, 840S.W.2d850, 855 note 2 (Mo.banc1992) (facts at plea and sentencing of defendant were somewhat different than facts adduced at trial of co-conspirator). At times, a witness who has probative testimony will be unwilling to testify until a satisfactory agreement is reached with the witness. State v. Kilgore, 771S.W.2d57, 67 (Mo.banc1989) (no fundamental unfairness where penalty phase witness did not agree to testify until conclusion of guilt phase of Kilgore's trial, resulting in inconsistent evidence in guilt and punishment phases). "[T]here is no rule requiring the state to argue mirror-image theories in the separate prosecutions of co-perpetrators." State v. Nicklasson, 967S.W.2d596, 621 (Mo.banc1998).

Appellant cites no case where a first trial has overturned because something inconsistent was presented at a later trial. Rather, at the very most, a court has required the state to re-try the co-conspirator using a theory which is not inconsistent with the original theory presented at the prior trial. *See*, *e.g.*, Smith v. Groose, 205 F.3d 1045, 1054 (8thCir. 2000).

Thus, appellant has failed to show he has suffered any wrong. His trial was first, and was not inconsistent with any other trial. The state was not required to present

entirely consistent theories in later trials, but even if it were it would not aid appellant, because the most that would be required is for the state to maintain the theory presented in appellant's case– appellant's case became the bar by which to measure inconsistencies. Therefore, the only remedy appellant could request would be that the state maintain the theory already presented in his case.

Appellant relies on Smith v. Groose (App.Br. 124). But nothing in that case requires reversal of a first trial when an inconsistent theory is presented at a later trial. Therefore, appellant's claim has no merit, and must fail.

4. In any event, the prosecutor's question did not change the theory of the case

As shown above, in the trial of Mr. Christeson, appellant said that Mr. Christeson cut Kyle Brouk's throat (Tr989-90). In opening statements during appellant's trial, the prosecutor stated that Mr. Christeson cut Kyle's throat, and that appellant was guilty of all the murders on a theory of accomplice liability (App.Exh.34B, pg. 187-88, 192-93). During the state's case, the prosecutor presented evidence that in appellant's previous oral and taped statements and sworn testimony, he had stated that Mr. Christeson cut Kyle's throat (App.Exh.34C, pg. 392, 424, 436-38). During closing argument, the prosecutor said that appellant "went and got a concrete block, and came back to find Kyle's throat cut" (App.Exh.34D, pg. 656). The prosecutor never mentioned appellant's knife in closing argument, but only argued that it did not matter whether appellant held Kyle's feet during the drowning, he was still guilty of first degree murder under the

theory of accomplice liability (App.Exh.34D, pg. 656-57).

Thus, the prosecutor's theory of the case, in opening statements, during the state's case, and in closing argument, was that Carter was guilty of first degree murder because he helped appellant commit each murder after deliberation on the matter. Moreover, in opening statements, during the state's case, and, importantly, in closing argument, the prosecutor said that appellant cut Kyle's throat.

The single, brief exchange with Carter, where he denied that his knife was used to cut Kyle's throat, did not present an inconsistent theory, but only asked which knife did the cutting. The prosecutor never referenced this exchange during trial, and never argued that appellant was really the one who cut Kyle's throat. In fact, the prosecutor argued the opposite. Thus, whether or not the question of Carter suggested a different knife was used to cut Kyle's throat, the only theory the state argued to the jury was that appellant alone cut Kyle's throat. Therefore, the exchange did not change the prosecutor's theory of the case, and appellant's point must fail.[5]

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[5] In affirming co-conspirator Jesse Carter's conviction, the Court of Appeals, Southern District, concluded that the state presented an inconsistent theory in Carter's case. State v. Carter, 71 S.W.3d 267, 272 (Mo.App.S.D.2002). Respondent submits the case was incorrectly decided on that issue, as shown by the argument above.

5. Finally, appellant has not shown prejudice

The question in Carter's trial about which knife was used to cut Kyle's throat did not prejudice appellant's earlier trial. Logically, it could not, because appellant's trial was complete long before the question was asked. Further, the question was answered in the negative– the evidence from both trials was still that appellant cut Kyle's throat. Finally, considering the overwhelming strength of the evidence of appellant's acts in raping and murdering Ms. Brouk and murdering her two children, there is no reasonable probability that, had the jury heard that Carter cut Kyle's neck under appellant's order (which is the most that can be made of appellant's claim), its decision to give appellant the death penalty would have been at all affected. Therefore, appellant's point must fail.

POINT XIII

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of counsel on grounds of trial counsel's not giving an even more detailed penalty phase opening statement and closing argument because the statement and argument were not so egregiously deficient that they undermined the adversarial process in that the opening statement explained the evidence which would be presented and the closing argument advocated for life imprisonment.

For his thirteenth point on appeal, appellant claims the motion court clearly erred in overruling his claim that trial counsel should have given a more detailed opening statement and closing argument in penalty phase (App.Br. 126).

1. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

To obtain relief on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was unreasonable, and that such unreasonable performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687 (1984). "The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be

relied on as producing a just result." Clayton v. State, 63 S.W.3d 201, 206 (Mo.banc2001); Strickland v. Washington, 466 U.S. at 686.

2. Facts

At trial, appellant's trial counsel, Valerie Leftwich, gave a penalty phase opening statement which emphasized that the jury had already decided that appellant would die in prison, summarized the evidence from key witnesses, characterized appellant as "an emotionally beat-down child," and said she would ask the jury "to choose life over death" (Tr1543-45).

Her penalty phase closing argument began by summarizing the process for determining the sentence, emphasizing that the jury had to impose life "unless" they found every requirement and they never had to impose the death penalty, and telling the jury that they had to consider all the evidence in determining the sentence (Tr1716-17). Then she emphasized that appellant's co-conspirator was "just as guilty" but would get life imprisonment, discussed sad events in appellant's childhood, emphasized that each individual juror had to determine whether death was the appropriate penalty, discussed appellant's age and lack of criminal history, and closed by stating that he would "die in prison no matter what you do at this point," and that they would choose either a natural death for him or one "by lethal injection" (Tr1717-20).

At the hearing on appellant's motion, Ms. Leftwich testified she had "no reason" for not asking the jury to consider all the mitigating circumstances and not asking the jury

to impose life imprisonment (Tr284, 368).

The motion court denied this claim, finding that trial counsel did not act unreasonably (PCRTr937).

3. The statement and argument were not egregiously deficient

Faced with the horrible way in which appellant raped Ms. Brouk and murdered her and her children, the overwhelming evidence of his guilt, no mental defense, and a jury which had necessarily determined that appellant had just lied to them on the stand, trial counsel had not much left to argue except that the process favors life imprisonment, appellant would not be released from prison so there was no need to sentence him to death, his age, his co-defendant's sentence, the sad events of his childhood, he had a family that loved him, and reminding the jurors that each of them, individually, had the onus of choosing life or death for appellant. Trial counsel's opening statement and closing argument covered each of these points in a perfectly competent manner.

Appellant complains that the statement and argument were short (App.Br. 127), but there is no requirement that a lawyer sacrifice brevity and clarity for the sake of taking up more pages of transcript. Appellant has not shown that trial counsel's penalty phase statement and argument were so egregious that they undermined the fairness of that stage of the proceedings. Therefore, the motion court did not clearly err in denying his claim, and his point must fail.

POINT XIV

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of trial and appellate counsel on grounds that these counsel did not raise a claim that the charging document was defective because the state was not required to list the statutory aggravating circumstances in that nothing in Apprendi, Jones, or Ring require this result and, in any event, appellant's constitutional rights could not have been violated because he received actual notice, pre-trial, of the statutory aggravating circumstances.

For his fourteenth point on appeal, appellant claims the motion court erred in denying his claim that his counsel should have challenged the validity of the charging document on grounds that it did not list the statutory aggravating circumstances (App.Br. 131).

1. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

2. Appellant's claim has been repeatedly denied by this Court

This Court has repeatedly rejected appellant's claim. *See* State v. Edwards, 116 S.W.3d 511, 544 (Mo.banc2003); State v. Gilbert, 103 S.W.3d 743, 747 (Mo.banc2003) *and cases cited therein*; State v. Tisius, 92 S.W.3d 751, 766-67 (Mo.banc2002); State v.

Cole, 71 S.W.3d 163, 171 (Mo.banc2002). Therefore, appellant's point must be denied.

Appellant acknowledges that his claim has been rejected by this Court, but claims he is raising it now "because it is supported by recent authority from the United States Supreme Court and that Court has not decided this precise claim" (App.Br. 133, note 2). Appellant does not cite any more "recent authority" than Sattazahn v. Pennsylvannia, 537 U.S. 101, 111, 123 S.Ct. 732, 739-40 (January 14, 2003), citing to a portion of the opinion upon which only three Supreme Court justices agreed, and which says that under Apprendi and Ring, statutory aggravating circumstances are elements of the crime and must be proved beyond a reasonable doubt. Thus, appellant's citation is not "authority" to challenge the charging document; six justices refused to concur in that part of the opinion. Accordingly, his argument has no merit.

3. In any event, appellant suffered no constitutional harm, in that he received actual notice, pre-trial, of the statutory aggravating circumstances

Appellant does not contest the fact that he received actual notice of the statutory aggravating circumstances more than a year before trial (App.Exh.4A, pg. 7, 84-84). This satisfied the federal constitutional requirements, under the Sixth and Fourteenth Amendments, that the accused receive notice of the "nature and cause of the accusation." Hartman v. Lee, 283 F.3d 190, 194-96 (4th Cir. 2002) (listing cases finding deficient charging document did not violate Sixth Amendment where accused received actual notice of the crime charged); Blair v. Armontrout, 916 F.2d 1310, 1329 (8th Cir. 1990)

("the crucial question in state prosecutions is whether the defendant had sufficient notice of the potential charges against him that he could prepare to contest those charges").

Respondent notes that a recent case decided after appellant submitted his brief, United States v. Allen, 2004 WL 188080 (2004), holds that in a federal capital prosecution, the indictment must include at least one statutory aggravating circumstance. This case is distinguishable, because it is based on the Indictment Clause of the Fifth Amendment, Id. at 2, which does not apply to the states– states are not required to proceed by indictment, and need only give sufficient notice of the charges before trial. Apprendi v. New Jersey, 530 U.S. 466, 477, note 3, 120 S.Ct. 2348 (2000); Blair v. Armontrout, 916 F.2d at 1329; Hartman v. Lee, 283 F.3d at 195, note 4.

POINT XV

The motion court did not clearly err in denying appellant's motion for postconviction relief challenging the adequacy of this Court's independent statutory review because this claim has been repeatedly denied by this Court.

For his fifteenth point on appeal, appellant claims the motion court clearly erred in denying his motion for postconviction relief challenging this Court's independent statutory review and claiming trial and appellate counsel were ineffective for not challenging the review (App.Br. 136).

1. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

2. This claim should be summarily denied; such claims have been repeatedly rejected by this Court

The motion court did not clearly err in denying appellant's claims (PCRL.F. 940-41). Appellant's claim has been rejected by this Court numerous times. *See* State v. Edwards, 116 S.W.3d 511, 548, note 6 (Mo.banc2003); State v. Ringo, 30 S.W.3d 811, 826 (Mo.banc2000); State v. Wolfe, 13 S.W.3d 248, 266 (Mo.banc2000); State v. Rousan, 961S.W.2d831, 854-55 (Mo.banc1998), State v. Kinder, 942S.W.2d313, 339 (Mo.banc1996); Ramsey v. Bowersox, 149 F.3d 749, 754 (8th Cir. 1998); Sweet v. Delo,

125 F.3d 1144, 1159 (8thCir. 1997) ("We have rejected many arguments by Missouri petitioners" concerning proportionality review; constitution does not require the court "to consider the manner in which the court conducted its review or whether the court misinterpreted the Missouri statute."). Appellant cites no controlling case law which would lead to a contrary result. Therefore, this Court should summarily deny appellant's claim.

Appellant argues cites Palmer v. Clarke, 293 F.Supp.2d 1011 (D.Neb 2003), for the proposition that this Court must look at all murder cases in determining whether the death penalty is appropriate (App.Br. 138). However, Palmer is not controlling law, and it is distinguishable because it is based on the interpretation of a Nebraska state statute. Id. at 1041-42.

POINT XVI

The motion court did not clearly err in denying appellant's motion for postconviction relief claiming clemency is arbitrary and therefore unconstitutional because his claim is not ripe in that he has not yet applied for clemency.

For his sixteenth point on appeal, appellant claims he should be given life imprisonment because the clemency process is arbitrary and therefore unconstitutional (App.Br. 141).

1. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

2. Appellant's claim is not ripe

The motion court denied appellant's claim, finding that this Court had already addressed and rejected the same claim (PCRL.F. 940).

Appellant acknowledges that this Court denied this same claim in State v. Middleton, 80 S.W.3d 799, 817 (Mo.banc2002) (where defendant had not yet requested clemency, claim that clemency process was arbitrary and capricious was not ripe for review) (App.Br. 143). *See also* Middleton v. State, 103 S.W.3d 726, 743 (Mo.banc2003) (same). Appellant argues that because he must present his state constitutional claims to this Court, his claim must be ripe (App.Br. 143). This non-

sequitur fails to explain how he meets the standard for ripeness set out in Missouri Health Care Ass'n v. Attorney General of Missouri, 953S.W.2d617, 621 (Mo.banc1997). He has not been denied clemency, so he has suffered no wrong from the clemency process. Therefore, his claim is not ripe, and the motion court did not clearly err in denying his claim.

POINT XVII

The motion court did not clearly err in denying appellant's motion for postconviction relief alleging ineffective assistance of trial counsel for not presenting evidence that jurors do not understand the penalty phase instructions because this decision was reasonable in that this Court has repeatedly denied this claim.

For his seventeenth point on appeal, appellant claims that the motion court clearly erred in denying his claim that trial counsel should have shown the trial court Dr. Weiner's latest study claiming jurors do not understand the penalty phase instructions (App.Br. 145).

1. Standard of review

Review of the motion court's action is limited to a determination of whether the findings and conclusions of the court are clearly erroneous. Supreme Court Rule 29.15(k); Ringo v. State, 120 S.W.3d 723, 745 (Mo.banc2003).

2. The instructions are plainly understandable

The motion court denied appellant's claim, finding that this Court has repeatedly rejected his research, that the shortcomings of his previous study exist in his latest study, and that "Dr. Weiner's opinions and conclusions are not credible and his bias is obvious." (PCRL.F. 940).

The motion court did not clearly err. This Court has repeatedly rejected claims that jurors do not understand the penalty phase instructions, and rejected Dr. Wiener's

"latest" study, the one appellant discusses in his brief now, in Middleton v. State, 103 S.W.3d 726, 743 (Mo.banc2003), *and see cases cited therein*. (App.Exh.55, pg. 4-5, showing study was the same one done for Middleton PCR). In Lyons, this Court explained why Dr. Weiner's studies are deficient:

> As in Deck, the jurors in the present case did not participate in Wiener's study. The jurors in the study were not placed in a trial setting that matched appellant's case, and, most significantly, there is no reason whatsoever to believe that any of appellant's jurors misunderstood the instructions; the language of the instructions is plainly understandable.

Lyons v. State, 39 S.W.3d 32, 43 (Mo.banc2001).

Appellant argues that Dr. Weiner's latest study does not have the same problems as his earlier study (App.Br. 147-49). However, his latest study suffers from the same problems identified in Lyons. Trial counsel was not ineffective for not bringing the flawed study to the trial court's attention and raising this potentially sanctionable claim. State v. Clay, 975S.W.2d121, 135 (Mo.banc1998). Therefore, the motion court did not clearly err in denying appellant's claim, and his point must fail.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's motion for postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 27,899 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 13th day of February, 2004, to:

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